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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1924~~ 1925

No. 533 ~~104~~ 16

EDGAR S. APPLEBY AND JOHN S. APPLEBY, PLAINTIFFS
IN ERROR,

vs.

JOHN T. DELANEY, AS COMMISSIONER OF DOCKS OF THE
CITY OF NEW YORK

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 6, 1923

(29,843)

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AT A SPECIAL TERM, PART II, OF THE

**SUPREME COURT HELD IN AND FOR THE COUNTY OF
NEW YORK**

AT THE COURT HOUSE, IN SAID COUNTY, ON THE 27TH DAY OF APRIL,
1923

Present: Hon. James O'Malley, Justice.

In the Matter of the Application of EDGAR S. APPELBY and JOHN
S. APPELBY for a Peremptory Writ of Mandamus, Relators,
against JOHN H. DELANEY, as Commissioner of Docks of the
City of New York, Defendant.

ORDER ON REMITTITUR

The defendant in the above-entitled proceeding having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 20th day of January, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the 3rd day of March, 1922, as resettled by the order herein, dated the 27th day of April, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the same day; and a certified copy thereof, filed in the office of the Clerk of the County of New York on or about the 29th day of April, 1922, which said order grants relators' motion for a peremptory writ of mandamus; and the relators above named having also appealed from the said order of the Appellate Division as resettled aforesaid, in so far as said order limits the relators' right to a peremptory writ of mandamus, unless The City of New York should immediately acquire title to the property of the said relators; and the said appeals having been duly argued at the Court of Appeals, and after due deliberation the said Court of Appeals having, in an order made and dated the 17th day of April, 1923, and entered therein on the 18th day of April, 1923, ordered and adjudged that the order of the Appellate Division of the Supreme Court appealed from herein be reversed, and that of Special Term affirmed, with costs in this Court and in the Appellate Division; and having also further ordered that the record therein and the proceedings in said Court be remitted to the said Supreme Court, there to be proceeded upon according to law:

Now, upon reading and filing the said remittitur and on motion of George P. Nicholson, Corporation Counsel, attorney for defendant, it is

Ordered and adjudged that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court; and it is further

Ordered and adjudged that the defendant, John H. Delaney, as Commissioner of Docks of the City of New York, recover of the relators Edgar S. Appleby and John S. Appleby the sum of \$246.87, the amount of said defendant's costs as taxed, and that said defendant have execution therefor.

Enter.

J. O'M. J. S. C. James A. Donegan, Clerk.

Dated, New York, May 2d, 1923.

STATE OF NEW YORK, ss:

COURT OF APPEALS

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany on the 17th day of April in the year of our Lord one thousand nine hundred and twenty-three, before the Judges of said Court.

Witness, The Hon. Frank H. Hiscock, Chief Judge, presiding.
R. M. Barber, Clerk.

REMITTITUR—April 18, 1923

[Title omitted]

Be It Remembered, That on the 22nd day of June, in the year of our Lord one thousand nine hundred and twenty-two Edgar S. Appleby and ano., the relators appellants in this cause, came here unto the Court of Appeals, by Banton Moore, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John T. Delaney, as Commissioner, etc., the defendant-appellant in said cause, afterwards appeared in said Court of Appeals by John P. O'Brien, his attorney, and also filed a notice of appeal.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Banton Moore, of counsel for the relator-appellants, and by Mr. Charles J. Nehrbas, of counsel for the defendant-appellants, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, It is considered that the said order of the Appellate Division be reversed and that of Special Term affirmed, with costs in this court and in the Appellate Division.

c

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

R. M. Barber, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, April 18, 1923.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

R. M. Barber, Clerk. (Seal of the Court of Appeals.)

AT A SPECIAL TERM, PART II, OF THE SUPREME COURT HELD IN AND FOR THE COUNTY OF NEW YORK AT THE COURT HOUSE, IN SAID COUNTY, ON THE 13TH DAY OF JUNE, 1923

Present: Hon. Richard P. Lydon, Justice.

[Title omitted]

ORDER ON REARGUMENT

The relators-appellants having moved for a reargument of the appeal herein to the Court of Appeals and the said motion having been duly argued at the Court of Appeals, and after due deliberation the said Court of Appeals in an order dated the 5th day of June, 1923 having denied the said motion without costs, now upon reading and filing the said order of the Court of Appeals, it is

Ordered that the said order of the Court of Appeals be and the same hereby is made the order of this Court.

Enter.

(S.) R. P. L., J. S. C.

STATE OF NEW YORK:

IN COURT OF APPEALS

At a Court of Appeals for the State of New York Held at Court of Appeals Hall, in the City of Albany, on the Fifth Day of June, A. D. 1923

Present: Hon. Frank H. Hiscock, Chief Judge, presiding.

[Title omitted]

ORDER ON MOTION FOR REARGUMENT

A motion for a re-argument of the above cause, having been heretofore made upon the part of the relator-appellants herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered that the said motion be and the same hereby is denied without costs.

A copy.

(Sgd.) Wm. J. Armstrong, Deputy Clerk. (Seal.)

Notice of Appeal.

Supreme Court,

NEW YORK COUNTY.

IN THE MATTER

of

The Application of EDGAR S. AP-
PLEBY and JOHN S. APPEBY,
for a peremptory writ of man-
damus

against

MURRAY HULBERT, as Commis-
sioner of Docks of The City of
New York.

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SIRS:

PLEASE TAKE NOTICE that the above named EDGAR S. APPEBY and JOHN S. APPEBY hereby appeal to the Appellate Division of the New York Supreme Court in and for the First Department, from the order herein entered and filed in the office of the Clerk of New York County on or about the 29th day of December, 1920, denying the application of Edgar S. Appleby and John S. Appleby for a peremptory writ of mandamus herein,

4

Notice of Appeal.

and the said appellants appeal from each and every part of said order, as well as the whole thereof.

Dated, New York, January 27, 1921.

Yours, &c.,

BANTON MOORE,

Attorney for Appellants,

110 William Street,

Borough of Manhattan,

City of New York.

5

To:

JOHN P. O'BRIEN, Esq.,

Corporation Counsel,

WILLIAM F. SCHNEIDER, Esq.,

Clerk of the County of New York.

6

**Order Appealed From, Denying Application for
Mandamus.**

7

At a Special Term, Part I, of the Supreme Court held in and for the County of New York at the County Court House in the Borough of Manhattan, City of New York, on the 11th day of December, 1920.

Present: HON. EDWARD R. FINCH, Justice.

IN THE MATTER

8

of

The Application of EDGAR S.
APPLEBY and JOHN S. APPLEBY
for a peremptory writ of mandamus

against

MURRAY HULBERT, as Commissioner of Docks of the City of New York.

9

The application of Edgar S. Appleby and John S. Appleby for a peremptory writ of mandamus to be directed to Murray Hulbert as Commissioner of Docks of The City of New York, having duly come on to be heard;

Now, on reading the notice of motion herein, dated May 28, 1920, and the petition of Edgar S. Appleby and John S. Appleby, duly verified May 28, 1920, and the schedules A-J annexed

10 *Order Appealed From—Denying Application.*

thereto, and on reading and filing the affidavit of Murray Hulbert, duly verified June 7, 1920, and the stipulation signed by the attorneys for the respective parties hereto and dated September 20, 1920, and after hearing Banton Moore, Esq., of counsel for the petitioners, in support of said application, and Charles J. Nehrbas, Esq., of counsel for the defendant Commissioner of Docks in opposition thereto, and due deliberation having been had and on filing the opinion of the Court herein, it is, on motion of John P. O'Brien, Cor-

11 poration Counsel,

ORDERED that the said application be and the same hereby is in all respects denied as a matter of right, and not in the exercise of discretion, with \$10 costs.

Enter,

E. R. F.,
J. S. C.

Notice of Motion.

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SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

of

The Application of EDGAR S.
APPLEBY and JOHN S. APPLEBY
for a peremptory writ of man-
damus

14

against

MURRAY HULBERT, as Commis-
sioner of Docks of the City of
New York.

Sir:

PLEASE TAKE NOTICE that upon the petition of
Edgar S. Appleby and John S. Appleby, verified
the 28th day of May, 1920, annexed hereto, I shall
make a motion at Special Term, Part I, of the
New York Supreme Court, to be held in the New
York County Court House in the Borough of Man-
hattan, City of New York, on the 10th day of June,
1920, at 10:15 o'clock in the forenoon of that day
or as soon thereafter as counsel can be heard for
a peremptory writ of mandamus issued out of
and under the seal of the Supreme Court, directed
to Murray Hulbert as Commissioner of Docks
of the City of New York, requiring him forthwith

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16

Notice of Motion.

to issue to the petitioners a certificate or written authority, permitting them to improve their property mentioned and described in the petition as and in the manner set forth in the petition and for such other and further relief as may be just.

Answering affidavits must be served five days before the return day of this motion.

Dated, New York, May 28, 1920.

Yours, &c.,

17

BANTON MOORE,
Atty. for Petitioners,
95 William Street,
Borough of Manhattan,
City of New York.

To:

HON. MURRAY HULBERT,
As Commissioner of Docks of the
City of New York.

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Petition of Edgar S. Appleby and John S. Appleby Read in Support of Motion.

19

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

of

The Application of EDGAR S. APPLEBY and JOHN S. APPLEBY,
for a peremptory writ of mandamus

20

against

MURRAY HULBERT, as Commissioner of Docks of the City of New York.

To the Supreme Court of the State of New York:

21

The petition of Edgar S. Appleby and John S. Appleby respectfully shows to this Court and alleges:

(1) That the City of New York is a municipal corporation, and as such is successor to the municipal corporation known as the Mayor, Aldermen and Commonalty of the City of New York, and that Murray Hulbert is Commissioner of Docks of the said City of New York, and is and was the proper officer to whom to make the application hereinafter mentioned.

- 22 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

(2) That Edgar S. Appleby and John S. Appleby hereinafter frequently referred to as the petitioners, are and were on December 5, 1919, the owners in fee simple absolute of the following described premises in the County of New York, Borough of Manhattan, City of New York, to wit:

PARCEL NO. 1—ALL that certain piece and parcel of land under water, bounded and described as follows:

- 23 BEGINNING at a point formed by the intersection of the westerly side of Twelfth Avenue, with the northerly side of West 39th Street, running thence westerly along West 39th Street, 363 feet to the easterly side of Thirteenth Avenue, thence northerly along the easterly side of Twelfth Avenue, 198 feet 2 inches to the southerly side of West 40th Street, thence easterly along the southerly side of West 40th Street 379 feet 2 inches to the westerly side of Twelfth Avenue, thence southerly along the westerly side of Twelfth Avenue, 197 feet 6 inches to the point or place of beginning.

- 24 PARCEL NO. 2. ALL that certain piece and parcel of land under water, bounded and described as follows:—

BEGINNING at a point formed by the westerly side of Twelfth Avenue with the northerly side of West 40th Street, running thence westerly along the northerly side of West 40th Street 384 feet to the easterly side of Thirteenth Avenue, thence northerly along the easterly side of Thirteenth Avenue 198 feet 2 inches to the southerly side of West 41st Street, thence easterly along the southerly side of West 41st Street 400 feet 2 inches to the westerly side of Twelfth Avenue, thence southerly along the westerly side of

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion. 25

Twelfth Avenue, 197 feet 6 inches to the point or place of beginning.

TOGETHER with all manner of wharfage, crannage, advantages and emoluments growing or accruing by or from that part of the exterior line of the said City, lying on the westerly side of Thirteenth Avenue, fronting on the Hudson River, with full power to collect and receive the same for their own proper use and benefit forever, excepting therefrom such wharfage, crannage, advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half of 39th Street; the southerly and northerly half of 40th Street and the southerly half of 41st Street, which were reserved by the Mayor, Aldermen and Commonalty of the City of New York, their successors and assigns, with full power to collect and receive the same for their own proper use and benefit forever, as hereinafter set forth. 26

(3) That said Edgar S. Appleby and John S. Appleby are entitled to fill in and improve the above described premises at their pleasure. 27

(4) That on or about the 5th day of December, 1919, by application in writing, dated on said date, the said Edgar S. Appleby and John S. Appleby applied to the said Murray Hulbert as Commissioner of Docks as aforesaid for permission to fill in or improve the said premises hereinbefore described, in the manner and method set forth in the plans annexed to said application, which application is attached hereto and made a part hereof as if set forth herein at length and designated as "Schedule A".

(5) That on or about January 31, 1920, the said

28 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

Murray Hulbert, as Commissioner of Docks as aforesaid, denied the said application of the said Edgar S. Appleby and John S. Appleby, by letter of said date, upon the ground, "that the proposed construction is not in accordance with the new plan", and that a copy of the said letter denying said application, is attached hereto and made a part hereof, as if set forth herein at length and designated as "Schedule B".

29 (6) That the new plan referred to in the said letter of the Commissioner of Docks is the so-called present plan for the improvement of the water front along the North River from 39th to 41st Streets, as amended by resolution of the Commissioner of Docks on July 16, 1916, and approved by the Commissioners of the Sinking Fund in July, 1916, as set forth in detail and shown on the proposed amendment to the amended new plan, dated May 1, 1916, attached hereto and marked "Schedule C", which proposed amendment provides for the discontinuance of the proposed bulkhead lines of the year 1890, and disregards entirely, the other proposed bulkhead
30 lines, and especially the established bulkhead line of 1837, in reference to which petitioners' property rights were granted and fixed as hereinafter set forth.

(7) That the present proposed amendment to the amended new plan, so called, and other proposed or discontinued amendments hereinafter set forth, are and were ineffectual to impair or destroy the petitioners' property and rights or to interfere therewith. And that if the adoption of any of the proposed amendments to the amended new plan, so called be construed as impairing, interfering with or destroying petitioners' prop-

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion. 31

erty or rights they are and were invalid as violating, first, Article I, Section 10, Part I, of the Constitution of the United States, by impairing the obligation of a contract; second in violation of Articles V and XIV (Section 1) of the additions to and amendments of the Constitution of the United States, and Article I, Section 6, of the Constitution of the State of New York, by depriving the petitioners or their predecessors in title of their property or rights without due process of law and taking their property for public use, without just compensation, as will appear from the following recitals:— 32

(8) That in and prior to the year 1837, the Manhattan shore of the Hudson River, in the vicinity of the petitioners' premises hereinbefore described was very irregular, and in order that the said water front might be improved with streets and avenues, a map was prepared by George B. Smith, City Surveyor, showing the projected line of the City of New York extending along the Hudson River from Hammond Street to 135th Street, dated March 10, 1837, an extract of which map is attached hereto and marked "Schedule D". 33

(9) That on or about the 12th day of April, 1837, The People of the State of New York, represented in Senate and Assembly, duly enacted Chapter 182 of the Laws of 1837, entitled "An Act to establish a permanent exterior street or avenue in the City of New York along the easterly shore of the North or Hudson's River and for other purposes".

(10) Said act was passed the 12th day of April, 1837, and, at all times mentioned herein was, and now is, in full force and effect, insofar as the

34 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

right and title of the petitioners to the premises described in paragraph 2 hereof are concerned.

(11) That a copy of Chapter 182 of the Laws of 1837 is attached hereto and made a part hereof, as if set forth herein at length and designated as "Schedule E".

35 (12) That on or about the 1st day of August, 1853, The Mayor, Aldermen and Commonalty of the City of New York for a valuable consideration and in consideration of certain covenants and agreements mentioned and contained in a certain indenture in writing, duly granted, bargained, sold, aliened, released and conveyed unto one Charles E. Appleby and unto his heirs and assigns forever, all that certain water lot, vacant ground or soil under water to be made land and gained out of the Hudson or North River in the Harbor of New York, bounded and described in said instrument and including the premises hereinbefore described as Parcel No. 1 in paragraph 2 of this petition, which said indenture or deed, marked "Schedule F", is annexed hereto and made a part hereof, as if set forth herein at
36 length.

(13) That the said deed of conveyance to said Charles E. Appleby was duly recorded in the office of the Register of New York County on or about the 3rd day of September, 1853, in Liber 636 of Conveyances, at page 452, and a duplicate or counter part thereof is on record in the Comptroller's office of New York City, in Book 1 of Grants, at page 181.

(14) That on or about the 24th day of December, 1852, the Mayor, Aldermen and Commonalty of the City of New York, for a valuable consideration and in consideration of certain covenants and

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion. 37

agreements mentioned and contained in a certain deed of conveyance, a copy of which is hereto annexed and marked "Schedule G", duly granted, bargained, sold, aliened, released and conveyed unto Robert Latou and unto his heirs and assigns forever, all that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River in the Harbor of New York, therein bounded and described and including the premises designated as Parcel No. 2 in paragraph 2 of this petition, which said deed of conveyance marked "Schedule G" is annexed hereto and made a part hereof, as if set forth herein at length. 38

(15) That the said deed of conveyance to said Robert Latou was duly recorded in the office of the Register of New York County on or about the 3rd day of January, 1853, in Liber 623 of Conveyances at Page 170, and a duplicate or counter part thereof is on record in the Comptroller's office of the City of New York in Book 2 of Grants at page 117.

(16) That thereafter and on or about the 12th day of January, 1854, said Robert Latou duly sold and conveyed to the said Charles E. Appleby and unto his heirs and assigns, all of the said premises, rights, privileges and emoluments hereinbefore mentioned, bounded and described and contained in the said deed marked "Schedule G", and which said deed to Appleby was duly recorded in the office of the Register of New York County on the 16th day of June, 1865, in Liber 932 of Conveyances, Page 458. 39

(17) That said Charles E. Appleby was the sole and continuous owner of the said premises, bounded and described in "Schedules F and G",

40 *Petition of Edgar S. Appleby and John S.
 Appleby, Read in Support of Motion.*

together with the rights, privileges and emoluments appertaining thereto from the date of each of said deeds of conveyance to him until the time of his death.

41 (18) That said Charles E. Appleby died on the 15th day of December, 1913, in the City and County of New York, leaving him surviving his two sons, Edgar S. Appleby and John S. Appleby, the petitioners herein, and no other heirs at law or next of kin. Said Charles E. Appleby left a last Will and Testament, which was duly admitted to probate in the office of the Surrogate of Monmouth County, New Jersey, on or about the 26th day of December, 1913, and an exemplified copy of said last Will and Testament, duly authenticated, was duly filed in the office of the Surrogate of New York County on or about January 23rd, 1914, and in the office of the Clerk of New York County on or about the 24th day of January, 1914, and in and by said last Will and Testament, said Charles E. Appleby devised and bequeathed all of his property, both real and personal to his two sons, the said Edgar S. Appleby and John S.
42 Appleby, the petitioners herein, absolutely and in equal shares.

(19) That since the date of the death of said Charles E. Appleby, the said Edgar S. Appleby and John S. Appleby have been the owners in fee of all the said premises hereinbefore described, together with all rights, terms, privileges, wharfage, cranage, dockage and emoluments appertaining or belonging thereto.

(20) Upon information and belief, that the said deeds of conveyances from the Mayor, Aldermen and Commonalty of the City of New York, hereinbefore referred to, were made and accepted

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion. 43

in full faith and reliance upon the provisions of said Chapter 182 of the Laws of 1837, and with full and complete knowledge and understanding of the parties that they were so accepted by the grantees, relying upon the terms, conditions and covenants in said deeds and the provisions of said Chapter 182 of the Laws of 1837.

(21) Upon information and belief, that upon the execution and delivery of said deeds of conveyances from the Mayor, Aldermen and Commonalty of the City of New York, the title in fee simple absolute to the lands under water therein described, vested in said grantees, their heirs and assigns, and also the easements of light, air and access in and to the streets and avenues therein and abutting thereon and also certain rights and privileges of wharfage, cramage and dockage, and the sole and exclusive right to build the streets and avenues mentioned in said deeds, and the right to fill in and improve the said premises between the streets and avenues at the pleasure of said grantees, their heirs and assigns, without permission from the Mayor, Aldermen and Commonalty of the City of New York, its successors in interest, or any department thereof, except of course, any permission of the Dock Department, reasonably required for the purpose of avoiding interference in the prosecution of the work. 44

(22) That neither the petitioners nor their predecessors in title, have ever been required to build or erect the streets, wharves or bulkheads referred to in said deeds. 45

(23) That the petitioners and their predecessors in title have duly acted, done, performed, and complied with, all the articles, terms, covenants and agreements on their part contained in the said

46 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

deeds from the Mayor, Aldermen and Commonalty of the City of New York.

(24) That neither the petitioners nor their predecessors in title, except as hereinbefore mentioned have ever parted by deed, agreement, condemnation proceeding or otherwise with any right, title or interest in and to the said premises mentioned and described in said deeds, or any part thereof, or with any rights, privileges, easements or emoluments therein or appurtenant thereto.

- 47 (25) That under and by virtue of Chapter 137 of the Laws of 1870, passed April 5, 1870, and entitled, "An act to reorganize the local government of the City of New York," as amended by Chapter 574 of the Laws of 1871, passed April 18, 1871, and entitled, "An act to amend an act entitled 'An act to reorganize the local government of the City of New York,' passed April 5, 1870." The Department of Docks of the City of New York was created, the head of which consisted of a board of five persons and said Department of Docks was authorized and directed to determine upon a plan for the improvement of the whole or any part of
- 48 the water front of the City of New York, said plan to be approved by the Commissioners of the Sinking Fund, and said board of the Department of Docks was authorized to acquire by purchase or condemnation proceedings, in the name and for the benefit of the corporation of the City of New York, any and all property in said City to which the corporation of the City of New York then had no right or title, and any rights, terms, easements and privileges pertaining to said property in said City and not owned by said corporation, necessary to carry said plan into effect when adopted and after the adoption of said plan by the Com-

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.

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missioners of the Sinking Fund, said Board of the Department of Docks was directed to lay out, establish and construct wharves, piers, bulkheads, basins, docks and slips in and upon or about the property not owned by the Mayor, Aldermen and Commonalty of the City of New York, without interfering with the property or rights of any other person; but no power or authority whatever was or could be given by said Statute or any other Statutes to the Mayor, Aldermen and Commonalty of the City of New York, or the Board of the Department of Docks, or any other board or department of said City, to establish and construct such wharves, piers, bulkheads, basins, docks or slips in and upon or about the property not owned by the Mayor Aldermen and Commonalty of the City of New York, or otherwise interfere with the same unless and until compensation was made.

50

(26) That the wharves, piers, bulkheads, basins, docks and slips in the contemplation of said Statutes of 1870 and 1871, were to be built by the Mayor, Aldermen and Commonalty of the City of New York, or the Board of the Department of Docks, or their successors, according to the said plan when duly adopted and after acquiring the property, rights, terms, easements and privileges necessary therefor, and, when constructed, such structures were to be for the sole benefit of the said corporation, or its successors, and by the express terms of said Statute, such structures were not authorized to be built and such plan could not be legally and physically carried into effect, so as to impair or injure vested property rights not owned by said City, unless and until such private property and all rights, terms, easements and privileges pertaining thereto, as were necessary,

51

- 52 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

proper and desirable for the purpose, were acquired by the corporation, The Mayor, Aldermen and Commonalty of the City of New York, or its successors by voluntary purchase or legal proceedings under the power of eminent domain.

- 53 (27) Upon information and belief, that on or about the 27th day of April, 1871, pursuant to the said Statutes of 1870 and 1871, the said Commissioners of the Sinking Fund approved a plan for the improvement of the water front in the North or Hudson River, which plan was theretofore submitted to said commissioners by the said Board of the Department of Docks, and said plan included petitioners' said land under water between Twelfth and Thirteenth Avenues, Thirtieth and Fortieth Streets, as shown on said Plan of 1871 annexed hereto as "Schedule H".

- 54 (28) Upon information and belief, that in and by said plan a marginal wharf, or so-called street, was laid out and proposed over petitioners' said property. Said proposed marginal wharf, or street, was to be 250 feet wide, and included all of Twelfth Avenue and so much of petitioners' property as lay west of Twelfth Avenue and within a distance of 150 feet westerly therefrom, and it was proposed by said plan that said marginal street or wharf should be the limit of solid filling and that no land under water west of such marginal street should be filled in.

(29) Upon information and belief, that on or about the 11th day of June, 1891, the Mayor, Aldermen and Commonalty of the City of New York instituted a condemnation proceeding to acquire title to the property, rights, terms, easements, privileges and emoluments, etc., hereinbefore referred to in paragraph 2 of this Petition,

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion. 55

but said condemnation proceeding was never consummated, and when an attempt was made by petitioners and their predecessors in title to consummate said proceeding, the said City of New York the successor to the Mayor, Aldermen and Commonalty of the City of New York, as aforesaid, by resolution of the Board of Estimate and Apportionment, at a stated meeting on July 30, 1914, attempted to discontinue said condemnation proceeding.

(30) That neither the City of New York nor any department thereof has ever attempted to acquire title to said premises referred to in paragraph 2 of this petition, or any part thereof, for the purpose of legalizing or carrying into effect the said dock department plan of 1871 or any subsequent plan, except as aforesaid. 56

(31) Upon information and belief, that on or about May 1, 1916, the Commissioner of Docks of the City of New York, adopted and transmitted to the Commissioners of the Sinking Fund of the City of New York, a plan for the alteration and amendment of the amended new plan between West 38th and West 42nd Streets, North River, Borough of Manhattan. The amendment consists of the discontinuance of the proposed bulkhead line of 1871, and the establishment of a new bulkhead line 100 feet in shore thereof. 57

(32) That the proceedings and communications of the Commissioner of Docks, Comptroller of the City of New York, the Commissioners of the Sinking Fund, are attached hereto and made a part hereof, as if set forth herein at length and marked "Schedule I".

- 58 *Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion.*

(33) That the object of this amendment, as expressed in one of said communications, was to increase the length of the piers 100 feet.

- 59 (24) That upon information and belief on or about the 30th day of March, 1920, the Commissioner of Docks adopted a new plan for the amendment of the amended new plan, and on or about the same day transmitted said new plan to the Mayor and Commissioners of the Sinking Fund for their approval, as appears by the letter from the Commissioner of Docks to the Mayor and Chairman of the Commissioners of the Sinking Fund, together with said proposed plan all attached hereto and made a part hereof and marked "Schedule J".

(35) Upon information and belief, that these proposed alterations and amendments of the amended new plan, and the new plan itself were ineffective to deprive the petitioners of their property and property rights aforesaid, and in no wise or manner impaired or affected their right to fill in and improve their said property at their pleasure, or the relief to be granted herein.

- 60 (36) That from time to time, the City of New York, acting through the Commissioner of Docks, or the Commissioner of Docks and Ferries, has undertaken the improvement of the water front, consisting of petitioners' premises, and has unlawfully exercised their control and dominion thereover, by building piers in the streets, and by leasing the sides of the piers by dredging the petitioners' lands under water and by using petitioners' premises for slips and basins appurtenant to said piers.

(37) That all of the aforesaid acts have been done without the permission and against the will

Petition of Edgar S. Appleby and John S. Appleby, Read in Support of Motion. 61

of the petitioners or their predecessors in title. That no compensation has ever been made to them and no right has ever been given by them to the said City or any department thereof for any of the acts aforesaid.

(38) Upon information and belief, that the petitioners have an absolute right to fill in and improve their said premises in accordance with either of the plans submitted by them to the Dock Department, without interference, or right of interference from the City of New York, or any department or agency thereof. 62

(39) That in order that such work could be done without such interference, application was made to the Commissioner of Docks in the manner aforesaid; that the refusal of the said Commissioner of Docks to give his permission to the prosecution of the work was arbitrary and unwarranted; that the refusal was based solely upon the ground that the proposed improvement was not in accordance with the new plan; that it is obvious that no improvement could be made according to the new plan which would be of . . . advantage to the petitioners; that it is also obvious that they are under no obligation or requirement to recognize the new plan or any alterations or amendments to the new plan until said new plans are lawfully created and established as provided by the statutes in such cases made and provided. 63

WHEREFORE, the petitioners pray that a peremptory writ of mandamus, directed to Murray Hulbert as Commissioner of Docks of the City of New York be issued commanding and directing him forthwith to issue to the petitioners a certificate or written authority permitting them to im-

- 64 *Petition of Edgar S. Appleby and John S.
 Appleby, Read in Support of Motion.*

prove their said property, mentioned and described in paragraph 2 of this petition, as set forth in paragraph 4 of this petition and for such other and further relief as may be just, together with the costs of this proceeding.

EDGAR S. APPLEBY,
JOHN S. APPLEBY,
 Petitioners.

- 65 BANTON MOORE,
 Atty. for Petitioners,
 95 William Street,
 Borough of Manhattan,
 City of New York.

STATE OF NEW YORK,)
County of New York) ss.:

67

EDGAR S. APPLEBY and JOHN S. APPLEBY being duly sworn, say: that they are the petitioners in the above entitled proceeding; that the foregoing petition is true to their own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters they believe it to be true.

EDGAR S. APPLEBY,
JOHN S. APPLEBY.

68

Sworn to before me this)
28th day of May, 1920.)

GEO. B. LAUCK,

Notary Public, Kings Co., No. 44.
New York Co. No. 258, Register's No. 2212.
Term expires March 30, 1922.

69

70 *Petition, Schedule A, Application.*

To the Commissioner of Docks:

DEPARTMENT OF DOCKS AND FERRIES,

PIER "A," BATTERY PLACE,

NEW YORK CITY.

Date, December 5th, 1919.

Sir: Application is hereby made for permission to do the work hereinafter described.

71 1. The exact location of the property on which the work is to be done is as follows:

Parcel No. 1, West side of 12th Ave., between West 39th to West 40th Streets, Manhattan.

Parcel No. 2, West side of 12th ave., between West 40th to West 41st Streets, Manhattan.

Map of location shown in deeds and plans.

2. The premises are designated on the tax maps of The City of New York as:

Lt. 17 Block No. 665 Section No. 3 Borough of Manhattan.

Lt. 3 Block No. 1107 Section No. 4 Borough of Manhattan.

72 3. The name and address of the owner of the property is as follows

Names.

Addresses.

Edgar S. Appleby 11 John Street Manhattan.

John S. Appleby 55 Liberty Street, Manhattan.

4. When and under what authority were last improvements, if any, upon above-described property, made and completed? none.

5. What was the nature and cost of these improvements, and by whom made? (State what

Petition, Schedule A, Application.

73

improvement consisted of, whether filling in of lands under water or erection of bulkheads, piers, buildings and other structures.) none.

6. The proposed work consists of: (Describe accurately the work to be done.)

(1) By plan No. 1.

(2) By plan No. 2.

Plan No. 1.

This plan provides for the construction of a platform on piles, both vertical and bracing, with a close row of sheet piling on the inner line of the platform, within the limits shown on the plans. It is also proposed to deposit rip-rap, taking a natural slope from the sheet piling to about the front lines of the platform. Piles are to be about eighty feet in length and all timber workmanship, etc., to conform to the requirements of the Department of Docks for similar type of construction. Along the northerly line of 39th Street and the southerly line of 41st Street, it is proposed to drive a close row of piling between the existing shore line and the platform structure.

74

The construction is intended to make possible the filling in, grading and paving of the streets and avenue within the lines of the improvement as shown on plans.

75

Plan No. 2.

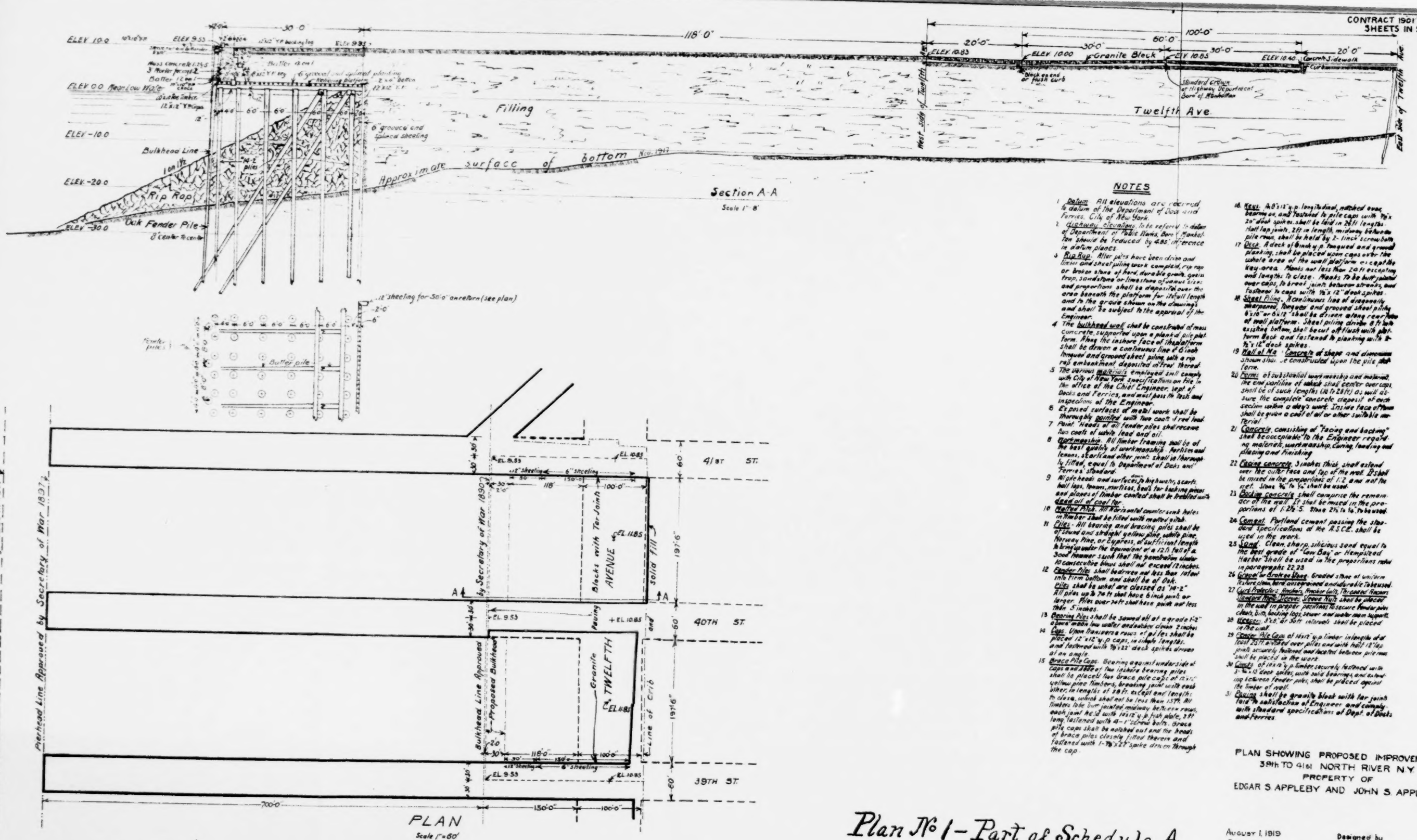
This plan is proposed as an alternative. It provides for the erection of a platform structure on piles, constructed along the lines of an ordinary open pier. Details of construction are shown on plans.

7. What is the estimated cost of the proposed work for which a Permit is asked? (State cost for each class of work.)

HUDSON RIVER

Exterior Line of Water Grant to the City made in 1871

Pierhead Line Approved by Secretary of War 1897



NOTES

1. **Datum.** All elevations are referred to datum of the Department of Docks and Ferries, City of New York.
2. **Highway.** Elevations, etc. referred to datum of Department of Public Works, Boro of Manhattan should be reduced by 4.85' difference in datum planes.
3. **Rip Rap.** After piles have been driven and liner and sheet piling work completed, rip rap or broken stone of hard, durable granite, gneiss, trap, sandstone or limestone of various sizes and proportions shall be deposited over the area beneath the platform for its full length and to the grade shown on the drawings and shall be subject to the approval of the Engineer.
4. **The bulkhead wall** shall be constructed of mass concrete, supported upon a platform of pile caps. Along the interior face of the platform shall be drawn a continuous line of 6 inch long and ground sheet piling with a rip rap embankment deposited in front thereof.
5. The various materials employed shall comply with City of New York specifications on file in the office of the Chief Engineer, Dept. of Docks and Ferries, and must pass the tests and inspections of the Engineer.
6. **Exposed surfaces of metal work** shall be thoroughly galvanized with two coats of red lead paint. Heads of all fender piles shall receive two coats of white lead and oil.
7. **Workmanship.** All timber framing and its joints, scarfing and other joints shall be thoroughly filled, equal to Department of Docks and Ferries standard.
8. All pile heads and surfaces to highway, scarf, half laps, tenons, mortises, bolts for backing piles and planes of timber contact shall be treated with dead oil of coal tar.
9. **Water Mark.** All horizontal counter sunk holes in timber shall be filled with molasses.
10. **Piles.** All bearing and bracing piles shall be of sound and straight yellow pine, white pine, Norway pine, or spruce, of sufficient length to bring up under the support of a 2 1/2' fall of a good hammer such that the penetration under consecutive blows shall not exceed 12 inches.
11. **Fender Piles.** shall be driven not less than 10 feet into firm bottom and shall be of Oak. Piles shall be what are classed as "A-2". All piles up to 7 1/2 ft shall have 6 inch joints or longer. Piles over 7 1/2 ft shall have joints not less than 5 inches.
12. **Bearing Piles.** shall be sawed off at a grade 1/2" above mean low water and under down 2 inches.
13. **Cap.** Upon transverse rows of piles shall be placed 12"x12" y.p. caps, in single lengths, and fastened with 3/4"x21" deck spikes driven at an angle.
14. **Brace Pile Caps.** Bearing against underside of caps and ends of two inside bearing piles shall be placed two brace pile caps of 12"x12" yellow pine timbers, breaking joint with each other in length of 24 ft. except and length 12 ft. in close, which shall not be less than 15 ft. All timbers to be jointed midway between rows, each joint held with 1/2"x12" y.p. fish plate, 2 ft long, fastened with 4-1" screws. Brace pile caps shall be notched out and the heads of brace piles closely fitted thereon and fastened with 1-7/8"x22" spike driven through the cap.
15. **Deck.** 40"x12" y.p. longitudinal, matched over bearing caps, and fastened to pile caps with 7/8"x20" deck spikes, shall be laid in 24 ft lengths. Half lap joints, 2 ft in length, midway between pile rows, shall be held by 2-1/2" inch screws.
16. **Deck.** A deck of 40"x12" y.p. tongued and grooved planking, shall be placed upon caps over the whole area of the wall platform except the key-area. Planks not less than 20 ft excepting and length 10 ft. Planks to be butt-jointed over caps, to break joints between strings, and fastened to caps with 3/4"x12" deck spikes.
17. **Steel Piling.** A continuous line of diagonally sharpened, tongued and grooved sheet piling 6'10" or 6'12" shall be driven along rear face of wall platform. Sheet piling driven 8 ft into existing bottom, shall be cut off flush with platform back and fastened to planking with 3-7/8"x12" deck spikes.
18. **Wall of the concrete** of shape and dimensions shown shall be constructed upon the pile platform.
19. **Form.** of substantial workmanship and material, the end portion of which shall center over cap, shall be of such lengths (16 to 24 ft) as will assure the complete concrete deposit of each section within a day's work. Inside face of form shall be given a coat of oil or other suitable material.
20. **Concrete, consisting of "facing and backing"** shall be acceptable to the Engineer regarding materials, workmanship, curing, loading and placing and finishing.
21. **Facing concrete.** 3 inches thick, shall extend over the outer face and top of the wall. It shall be mixed in the proportions of 1:2 and not less than 1/4" to 1/2" shall be used.
22. **Backing concrete** shall comprise the remainder of the wall. It shall be mixed in the proportions of 1:2 1/2:5. Stone 2 1/2 to 1 1/2 to be used.
23. **Cement.** Portland cement passing the standard specifications of the A.S.C.E. shall be used in the work.
24. **Sand.** Clean, sharp, silicious sand equal to the best grade of "Cam Bay" or Hempstead Harbor shall be used in the proportions noted in paragraphs 22, 23.
25. **Gravel or crushed stone.** Graded stone of uniform texture clean, hard and unweathered, to be used in the proportions noted in paragraphs 22, 23.
26. **Curt Protection.** 12"x12" y.p. timbers, 12' long, shall be placed in the wall in proper position to secure fender piles, 12' long, backing logs, sewer and water main supports.
27. **Spacing.** 3'x5' or 3'x6' intervals shall be placed in the wall.
28. **Fender Pile Caps.** of 12"x12" y.p. timbers, in length of 12 ft, 25 ft, 30 ft, 35 ft, 40 ft, 45 ft, 50 ft, 55 ft, 60 ft, 65 ft, 70 ft, 75 ft, 80 ft, 85 ft, 90 ft, 95 ft, 100 ft, shall be placed over piles and with half 12" lap joints, securely fastened and located between pile rows shall be placed in the work.
29. **Cap.** of 12"x12" y.p. timbers, 12' long, shall be placed over piles and with half 12" lap joints, securely fastened and located between pile rows shall be placed in the work.
30. **Cap.** of 12"x12" y.p. timbers, 12' long, shall be placed over piles and with half 12" lap joints, securely fastened and located between pile rows shall be placed in the work.
31. **Cap.** of 12"x12" y.p. timbers, 12' long, shall be placed over piles and with half 12" lap joints, securely fastened and located between pile rows shall be placed in the work.

PLAN SHOWING PROPOSED IMPROVEMENT
39th to 41st NORTH RIVER N.Y.
PROPERTY OF
EDGAR S APPLEBY AND JOHN S APPLEBY

Plan No 1-Part of Schedule A

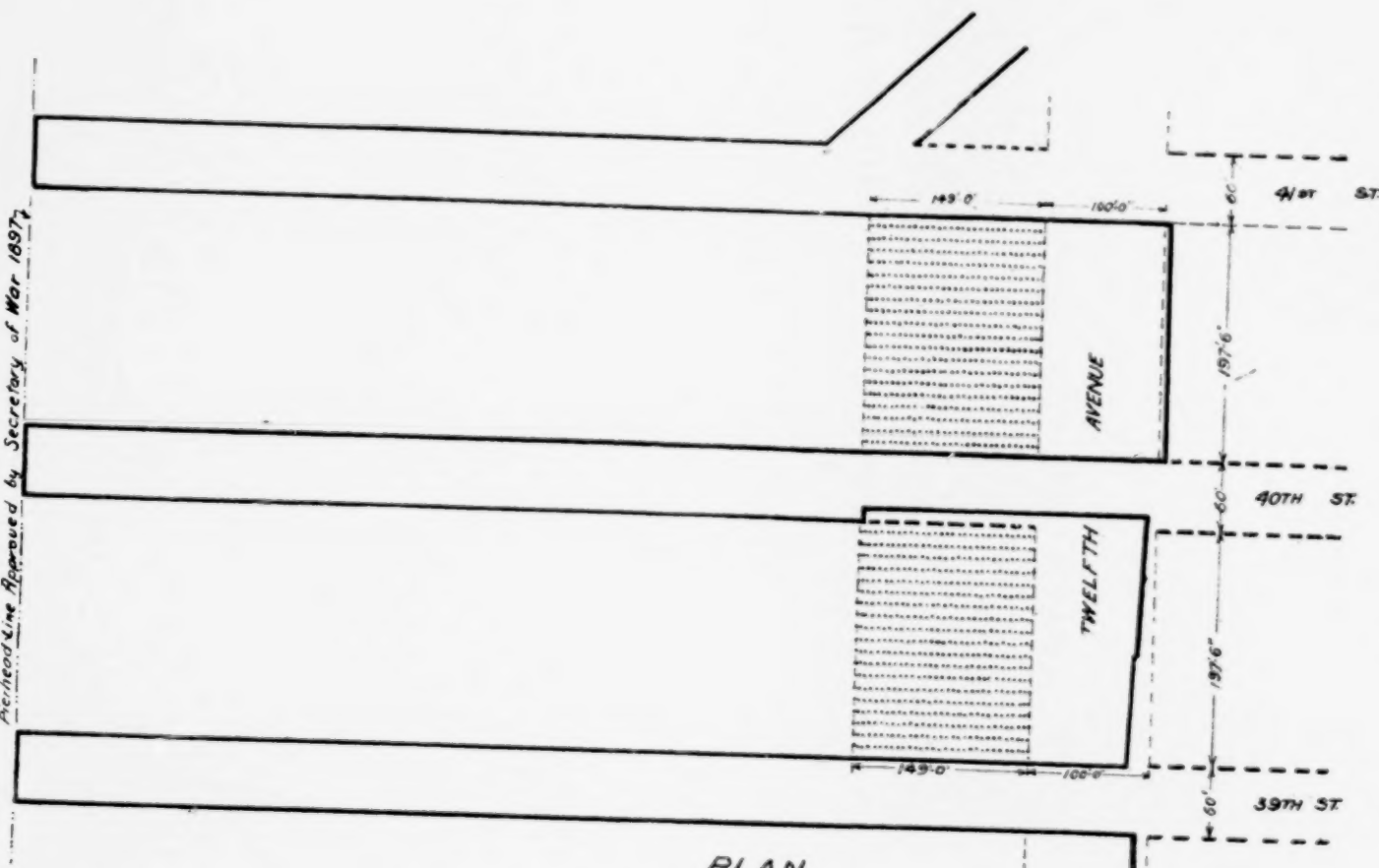
August 1, 1919
Scale 1" = 60'

Designed by
J.A. BENDEL
CONSULTING ENGINEER
111 Broadway, N.Y.
File Cont 1801
ACC 2889

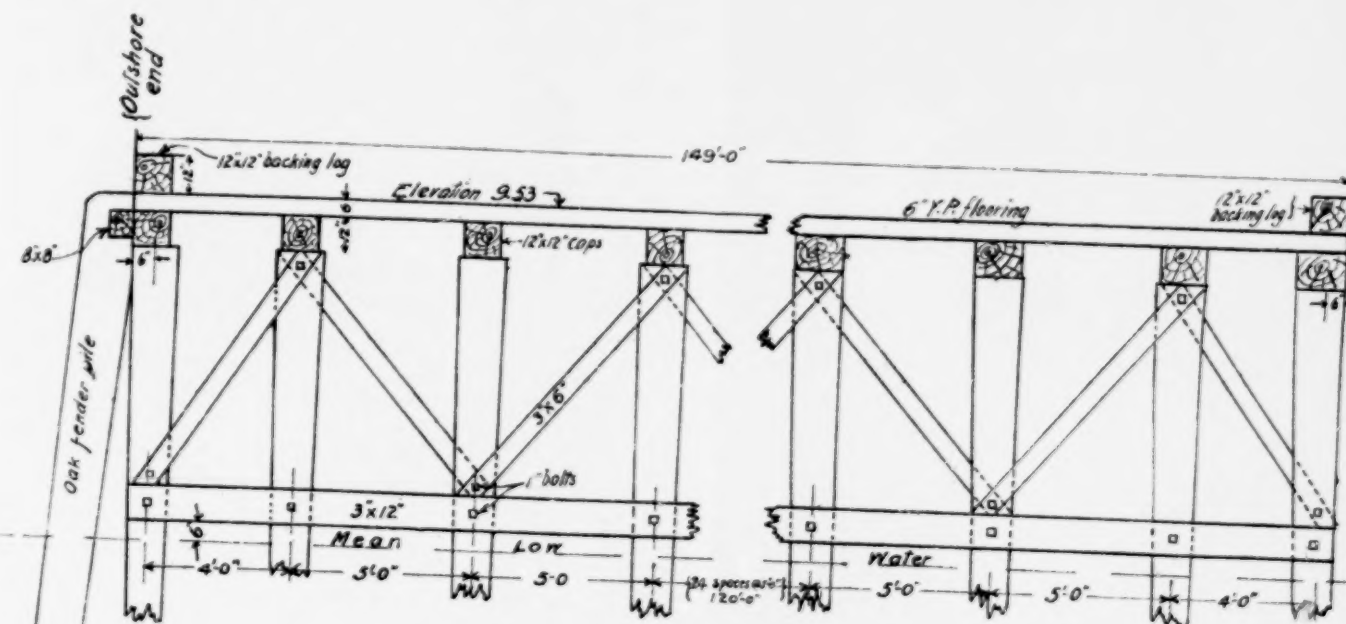
Plan No 2 - Part of Schedule A

HUDSON RIVER

Per head line Approved by Secretary of War 1897



PLAN
Scale 1"=60'



TYPICAL SECTION
BENTS 10' C/C.
Scale 1/2"=1'

Note: Workmanship, piles, driving, materials etc. to be equal and conform to the standards of The Department of Docks and Ferries of the City of New York

PLAN of PROPOSED IMPROVEMENT
39th to 41st STREETS, NORTH RIVER
NEW YORK CITY

PROPERTY OF
EDGAR S. APPLEBY & JOHN S. APPLEBY

August 11, 1919
Scale as noted

Designed by
J.A. BENSEL
Consulting Engineer
111 Broadway

82

Petition, Schedule A, Application.

Plan No. 1.....\$80,000

Plan No. 2.....\$50,000

8. The work is to be done by: (If not by day's labor, give names and addresses of contractors; also name and address of person who is to superintend the work; if more than one contractor, give name and address of each, with character and parts of work to be done by each.)

*Contractors.**Address.**Character of Work.*

83

Allan N. Spooner & Sons,
Inc., or as may be
changed after bids are
received.

Pier 11, North River

Shown on plans

Work supervised for owner by Allan N. Spooner & Sons, Inc., subject to change.

Address Pier 11, North River.

9. Has whole, or any part, of plans been passed upon by any Federal, State or other City Department or Bureau, or have any Permits been issued therefrom for any part of proposed work; if so, give Department or Bureau issuing each Permit, and file number of plans and number and date of Permit? No.

84

10. The nature of ownership is as follows: (If ownership is derived from any other source than is given below, state particulars.)

Property was acquired by applicants by Will of Charles E. Appleby, Deceased, date 17th day of May 1905, who acquired Parcel No. 1 from Mayor etc., of the City of New York, and Parcel No. 2 from Robert Latou, who acquired same from Mayor etc., as set forth in abstract of title. Above described property is covered by Grants of Lands Under Water from Mayor etc., of City of

Petition, Schedule A, Application.

85

New York to Chas. E. Appleby (1st Parcel) dated Aug. 1st, 1853 and from Mayor etc. of City of New York to Robert Laton, (2nd Parcel) dated 24th day of December 1852. If not acquired by purchase, deed or grant, state in full, giving particulars how premises were acquired. Present ownership under Will of Charles E. Appleby, deceased, who died at New York City, December 15th, 1913, which devised premises to applicants, as aforesaid. An exemplified copy of said Will was filed in the office of the Surrogate of New York County on or about January 23rd, 1914.

86

CITY AND COUNTY OF NEW YORK, ss.:

EDGAR S. APPLEBY and JOHN S. APPLEBY being duly sworn, depose and say, that they reside at New York City and Glencove, Long Island, respectively and that they are the owners of the premises described in this application; that deponent has truthfully stated the matter set forth in the foregoing application, and that all provisions of the building code, and all other laws and regulations governing said work, whether specified herein or not, and all the terms and conditions of the Permit if granted, will be complied with, in the erection of any structure, or the carrying on and completion of any and all work above described.

87

EDGAR S. APPLEBY,

JOHN S. APPLEBY,

Sworn to before me, this 5th/
day of December 1919. {

MARIE F. O'DONNELL,

Commissioner of Deeds, City of New York.

ABSTRACT OF TITLE

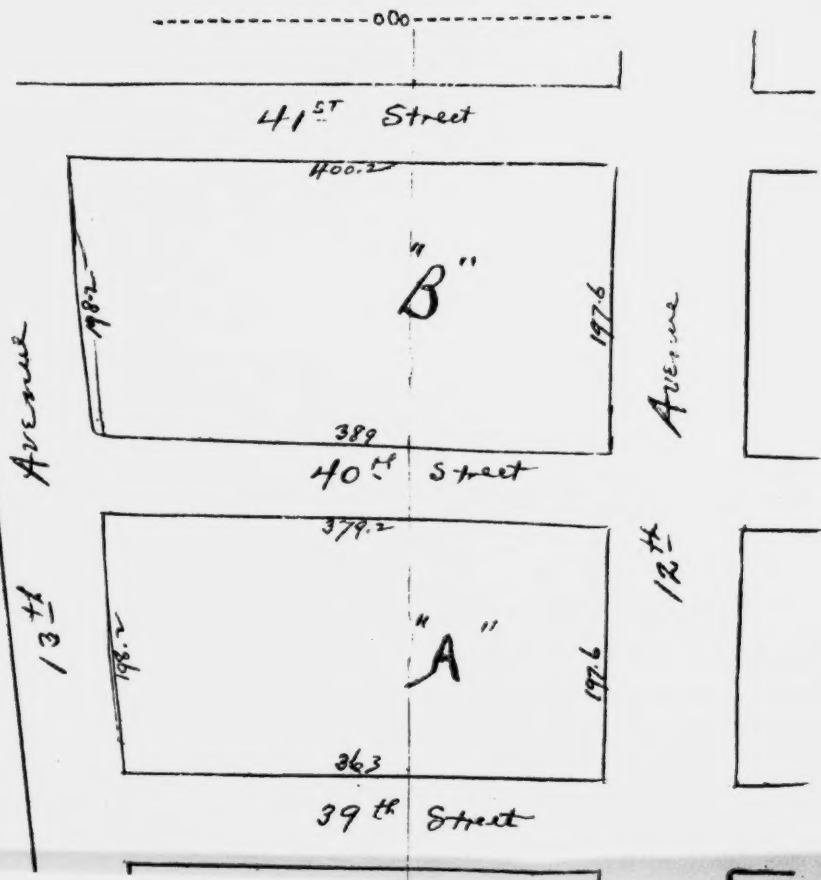
-of-

EDGAR S. APPLEBY and JOHN S. APPLEBY

-to-

PREMISES on the West side of Twelfth Avenue in the Borough
of Manhattan, New York City.

- A. Between West 39th Street and
West 40th Street.
- B. Between West 40th Street and
West 41st Street.





Petition, Schedule A, Application.

91

PARCEL A.

	Deed
THE MAYOR, ALDERMEN	D. August 1, 1853
and COMMONALTY of the	A. August 31, 1853
CITY OF NEW YORK	R. Sept. 3, 1853
to	L. 638 Cp. 452 in Reg.
CHARLES E. APPLEBY	Office, N. Y. Co.
CONVEYS:	

"ALL that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded, described and containing as follows; that is to say:

92

BEGINNING at a point of intersection of the line of original high-water mark with the line of the centre of Thirty-ninth Street and running thence westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the westerly line or side of Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said city, as established by law, thence northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed dated New York, June, 1853, made by John J. Serrel, City Surveyor, and to which reference may be

93

94

Petition, Schedule A, Application.

had; said map being considered a part of this Indenture. The premises conveyed being colored pink on said map, be the said dimensions more or less."

Includes premises in question shown on preceding diagram as Parcel A.

PARCEL B.

Deed

THE MAYOR, ALDERMEN and COMMONALTY of the CITY OF NEW YORK	D. December 24, 1852 A. December 30, 1852 R. January 3, 1852 L. 653 C ^p . 170 in Reg.
to ROBERT LATOU CONVEYS:	Office, N. Y. Co.

95

"ALL THAT certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York, and bounded, described and containing as follows; that is to say:

96

BEGINNING at the point of intersection of the line of original high-water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law; thence northerly along the westerly line or side of the Thirteenth Avenue two hundred and fifty-eight feet four and a half inches to the line of the centre of Forty-first Street; thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction along said line

Petition, Schedule A, Application.

97

of original high water mark as it runs to the point or place of beginning.

As particularly described, designated and shown on a map hereto annexed dated New York, December, 1852, made by John I. Serrell, City Surveyor, and to which reference may be had said map being considered a part of this indenture the premises conveyed being colored pink on said map be the said dimensions more or less."

Includes premises in question shown on preceding diagram as Parcel B.

98

	Deed
ROBERT LATOU	D. January 12, 1854
to	A. January 16, 1854
CHARLES E. APPLEBY	R. June 16, 1865
CONVEYS:	L. 932 Cp. 458 in Reg. Office of N. Y. Co.

Same premises as in preceding deed of the Mayor, Aldermen and Commonalty of the City of New York to Robert Latou, by same description and includes said Parcel B.

PARCELS A AND B.

99

LAST WILL AND TESTA-	Will dated May 17, 1905
MENT and CODICIL	Codicil " Aug. 22, 1912
of	Probated Dec. 26, 1913,
CHARLES E. APPLEBY,	in Surrogate's Office of
Dec'd.	Monmouth County, New
	Jersey.

Said testator gives and devises all his "property and estate, real and personal to my two sons, EDGAR STORM APPLEBY and JOHN STORM APPLEBY in equal shares."

And appoints EDGAR STORM APPLEBY and JOHN STORM APPLEBY executors.

100

Petition, Schedule A, Application.

A codicil to said will is dated August 22, 1912, and provides that "no bonds or other security be required of or from the executors named in my said will, or either of them upon the issuing of Letters Testamentary to them or either of them".

EXEMPLIFIED COPIES of said Will and Codicil were duly filed in the office of the Surrogate of New York County on or about January 23, 1914, and in the office of the Clerk of New York County on or about the 24th day of January, 1914.

101

Title to Parcels A and B is now vested in Edgar Storm Appleby and John Storm Appleby in equal shares.

102

Schedule B. Letter from Commissioner of Docks. 103**CITY OF NEW YORK**

Department of Docks.

Office of the Commissioner.

Pier A, North River, January 31st, 1920.

McK/AC

130282

To: Hon. J. A. Benschel,
111 Broadway,
New York City.

104

From: Department of Docks.

Subject: Denial of application of John S. Appleby and Edgar S. Appleby.

1. Replying to your letter of the 26th instant, I beg to advise you that the application of Edgar S. Appleby and John S. Appleby for permission to construct either a platform between West 39th and West 41st Streets, North River or a concrete wall on platform construction with sheet piling along the inner side to retain filling is hereby formally denied on account of the fact that the proposed construction is not in accordance with the new plan.

105

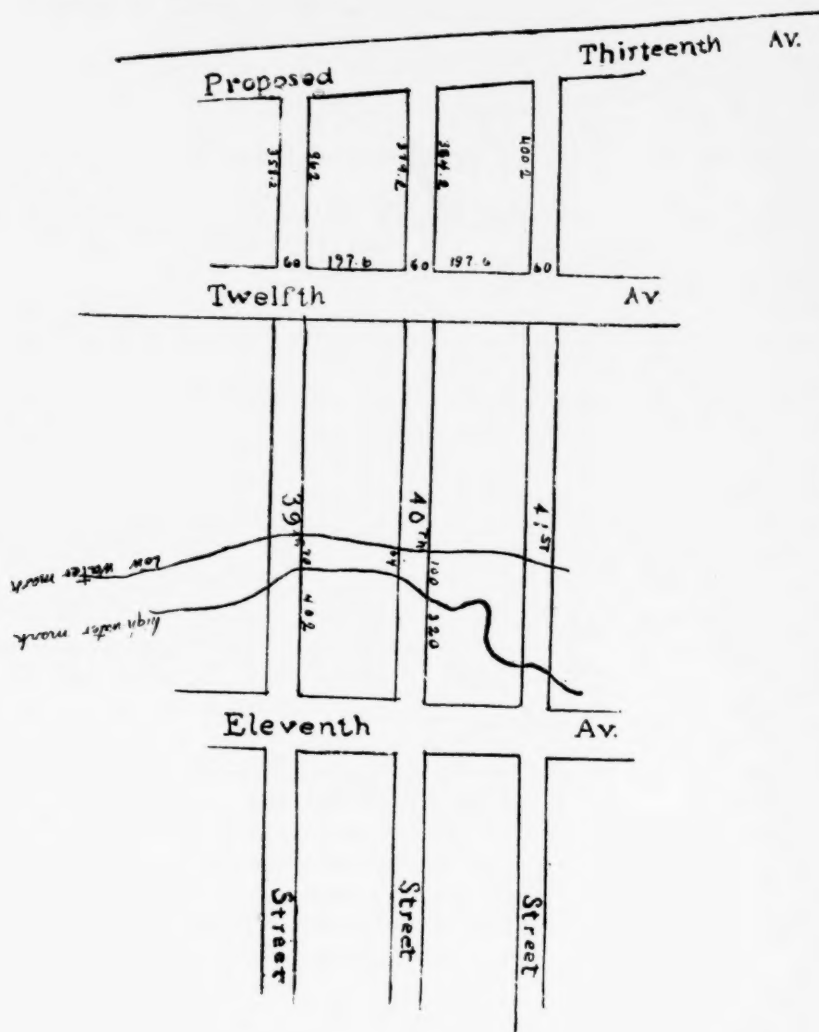
(Signed) MURRAY HULBERT,
Commissioner of Docks.

Schedule C. "1916 Amendment of Plan of 1871," Printed With Schedule I.

Schedule D. Smith Map of 1837.

Schedule II

HUDSON RIVER.



Map
 Showing a projected Exterior Line
 of the
 City of New York
 extending along the Hudson River
 from
 Hammond Street
 to
 135th Street

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Petition, Schedule F, Grant to Charles E. Appleby.

109

**Schedule E. Chapter 182 of the Laws of 1837
(Not Printed).**

Schedule F and Part of Schedule A.

**GRANT TO CHARLES E. APPLEBY
AUGUST 1, 1853.**

THIS INDENTURE, made the first day of August, One thousand eight hundred and fifty-three,

110

Between THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, of the first part,
and CHARLES E. APPLEBY, of the second part.

WITNESSETH, that the said parties of the first part for and in consideration of the sum of Six thousand, three hundred and sixty-nine Dollars and thirty-seven cents, lawful money of the United States of America, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released and conveyed, and by these presents do grant, bargain, sell, alien, release and convey unto the said party of the second part, and to his heirs and assigns

111

ALL that certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbor of New York, and bounded, described and containing as follows; that is to say:

BEGINNING at a point of intersection of the line of original high-water mark with the line of the centre of Thirty-ninth Street and running

112 *Petition, Schedule F, Grant to Charles E. Appleby.*

thence westerly, along said centre line of Thirty-ninth Street, about one thousand and sixty-five feet to the westerly line or side of Thirteenth Avenue, said westerly line or side of the Thirteenth Avenue being the permanent exterior line of said city, as established by law, thence northerly along the westerly line or side of the Thirteenth Avenue, two hundred and fifty-eight feet, four and one-half inches to a line running through the centre of Fortieth Street; thence easterly, along said centre line of Fortieth Street, about one thousand one hundred and twenty-six feet, eleven inches to the line of original high-water mark, and thence in a southerly direction along said centre line of original high-water mark, as it runs to the point or place of beginning, as particularly described, designated and shown on a map hereto annexed dated New York, June, 1853, made by John J. Serrel, City Surveyor, and to which reference may be had; said map being considered a part of this Indenture. The premises conveyed being colored pink on said map, be the said dimensions more or less.

113

SAVING AND RESERVING from and out of
114 the hereby granted premises so much thereof as by said map annexed forms part or portions of the Twelfth and Thirteenth Avenues, Thirty-ninth and Fortieth Streets, for the uses and purposes of Public Streets, Avenues and highways as hereinafter mentioned.

TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

AND also all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part, of, in and to all the

NORTH OR HUDSONS RIVER

Exterior Line as Established by Law

13th

Avenue

39th

40th

12th

Avenue

Street

Street

New York June 1853

John S. Howell

City Engineer

11th

Avenue

118 *Petition, Schedule F, Grant to Charles E.
Appleby.*

said premises and every part and parcel thereof, with the appurtenances.

TO HAVE AND TO HOLD the said premises hereby granted to the said Charles E. Appleby, his heirs and assigns to his own proper use, benefit and behoof forever.

119 AND the said party of the second part, for himself, his heirs and assigns, doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that the said party of the second part, his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part, or their successors, at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part, or their successors, already passed or adopted four good and sufficient Bulk-heads, Wharves, Streets and Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues, and
120 Thirty-ninth and Fortieth Streets as fall within the limits of the premises above described, and are reserved as aforesaid, from out thereof for public streets and will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

AND also that the said party of the second part, his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Thirty-ninth and Fortieth Streets, which the

Petition, Schedule F, Grant to Charles E. Appleby. 121

said party of the second part hath covenanted and agreed to make, erect and build as aforesaid, and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part, and their successors shall from time to time enact and pass or make relative thereto.

And also that the said streets and avenues shall forever thereafter continue to be and remain public streets and avenues and highways for the free and common use and passage of the Inhabitants of said City, and others passing and repassing by, through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now used or lawfully ought to be and in case default shall be made by said party of the second part, his heirs and assigns, in building, erecting, making or finishing the said bulkheads, wharves, streets and avenues by him covenanted herein to be built, erected, made and finished, and in filling in the same or any part thereof, or in complying with any ordinance, resolution or order of the said parties of the first part, or their successors when required then, and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make, or finish the bulkheads, wharves, streets and avenues as aforesaid, and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns, and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof, together with the interest

122

123

124 *Petition, Schedule F, Grant to Charles E.
Appleby.*

thereon and all costs and charges of the proceedings relative to the same, or to sell and dispose of the said hereby granted premises, or any part thereof, at Public Auction for the most that can be had for the same, and in case of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns, the amount of such deficiency, or to adopt and pursue any legal right or remedy that the said parties of the first part, or their successors now possess, and enjoy under and by virtue of any act of the Legislature of the State of New York, or that may hereafter be granted unto the said parties of the first part, or their successors by the Legislature of the State of New York, or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues, and the right receiving the wharfage, cranage and profits arising to and from the same, to any other person or persons their heirs, and assigns forever.

125 AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes, assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully so imposed or levied upon the hereby granted premises under and by virtue of any act or acts, of the Congress of the United States of America, or of the Legislature of the State of New York, or by any act, ordinance or resolution of the said parties of the first part, or their successors.

126 And it is hereby further covenanted and agreed, by and between the parties to these presents, and

Petition, Schedule F, Grant to Charles E. Appleby. 127

the true intent and meaning hereof, is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads avenues or streets herein before mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had, and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part, their successors or assigns, first had for that purpose. 128

AND the said parties of the first part, for themselves, their successors and assigns do covenant and agree to and with the said party of the second part, his heirs, and assigns that the said party of the second part, his heirs and assigns observing, fulfilling and keeping all and singular the articles, covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents, shall and lawfully may from time to time and at all times hereafter fully have, and enjoy, take and receive and hold to his own proper use, all manner of wharfage, cranage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City, lying on the westerly side of the hereby granted premises fronting on the Hudson River, with full power to collect and receive the same for his own proper use and benefit forever. 129

EXCEPTING therefrom such wharfage, cranage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of

130 *Petition, Schedule F, Grant to Charles E. Appleby.*

the entire width of the northerly half part of Thirty-ninth Street and the southerly half part of Fortieth Street, which shall be and are hereby reserved for the said parties of the first part, their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever.

131 AND it is hereby further agreed by and between the parties to these presents, and the true intent and meaning thereof, is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizin, of said parties of the first part or their successors or to operate further than to pass the estate, right, title of interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several charters and the various acts of the Legislature of the People of the State of New York.

132 AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition, that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof lawfully entitled to take and receive this grant as the purchaser of the right thereto, from the proprietors of the lands and premises on the easterly side of the premises hereby granted, and adjoining the same; or if the said party of the second part, his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part, and behalf, to be observed, performed, fulfilled and kept, then, and in every such case, these presents and every article, clause or thing herein contained shall be and become absolutely null and void.

Petition, Schedule F, Grant to Charles E. Appleby. 133

AND the said parties of the first part, and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted and shall thereafter be seized of the same with the appurtenances free, clear and discharged of, and from any claim, right, or pretence of claim, or right of the said party of the second part, his heirs and assigns anything herein contained to the contrary notwithstanding.

AND the said party of the second part, covenants and agrees to pay all expenses which has been incurred by said parties of the first part for regulating the streets embraced in this grant between the high-water mark, and the permanent exterior line of said city. 134

AND the said party of the second part, for himself, his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part, their successors and assigns, that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants, conditions and agreements, undertakings and provisions herein contained and on his part to be kept, performed and complied with. 135

IN WITNESS WHEREOF, to one part of these presents remaining with the said parties of the first part, the said party of the second part, hath set his hand and seal and to the other part thereof remaining with the said party of the second part, the said parties of the first part have caused the Common Seal of The City of New York to be affixed the day and year first above written.

JACOB A. WESTERVELT,
Mayor.

(Seal)

By The Common Council,
D. T. VALENTINE, Clk., C. C.

- 136 *Petition, Schedule F, Grant to Charles E. Appleby.*

City and County of New York, ss.:

On this 31st day of August, 1853, before me came David T. Valentine, to me personally known and who being by me duly sworn, did depose and say: That he resides in the City of New York; that he is the Clerk of the Common Council of The City of New York that the seal affixed to the foregoing instrument is the Corporate Seal of The City of New York, and was affixed thereto by their authority.

137

CHARLES BURDETT,
Commr. of Deeds.

Recorded the preceding at the request of Var-
num, Turney & Co., September 3d, 1853, at 58 Min-
utes past 12 P. M.

(Seal.)

138

Schedule G and Part of Schedule A.

Grant to Robert Latou, December 24, 1852.

THIS INDENTURE made the twenty-fourth day of December, one thousand eight hundred and fifty-two.

Between THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, of the first part and ROBERT LATOU of the second part.

WITNESSETH that the said parties of the first part for and in consideration of the sum of Four thousand nine hundred and thirty-seven 50/100 dollars lawful money of the United States of America to them in hand paid by the said party of the second part the receipt whereof is hereby acknowledged HAVE granted, bargained, sold, aliened, released and conveyed and by these presents DO grant, bargain, sell, alien, release and convey unto the said party of the second part and to his heirs and assigns 140

ALL THAT certain water lot or vacant ground and soil under water to be made land and gained out of the Hudson or North River or Harbour of New York and bounded, described and containing as follows, that is to say: 141

BEGINNING at the point of intersection of the line of original high water mark with the line of the centre of Fortieth Street and thence running westerly along said centre line of Fortieth Street one thousand one hundred and twenty-six feet eleven inches to the westerly line or side of the Thirteenth Avenue, said westerly side of the Thirteenth Avenue being the permanent exterior line of said City as established by law; thence north-erly along the westerly line or side of the Thir-

142 *Petition, Schedule G, Grant to Robert Latou.*

teenth Avenue two hundred and fifty-eight feet four and a half inches to the line of the centre of Forty-first Street; thence easterly along said centre line of Forty-first Street one thousand three hundred and thirty-eight feet eleven inches to the line of the original high water mark and thence in a southwesterly direction along said line of original high water mark as it runs to the point or place of beginning

143 As particularly described, designated and shown on a map hereto annexed dated New York, December, 1852, made by John I. Serrell, City Surveyor, and to which reference may be had said map being considered a part of this indenture the premises conveyed being colored pink on said map be the said dimensions more or less

SAVING AND RESERVING from and out of the hereby granted premises so much thereof as by said map annexed forms parts or portions of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets for the uses and purposes of public streets, avenues and highways as herein-after mentioned.

144 . TOGETHER with all and singular the privileges, advantages, hereditaments and appurtenances to the same belonging or in anywise appertaining.

AND ALSO all the estate, right, title, interest, property, claim and demand whatsoever of the said parties of the first part of in and to the said premises and every part and parcel thereof with the appurtenances.

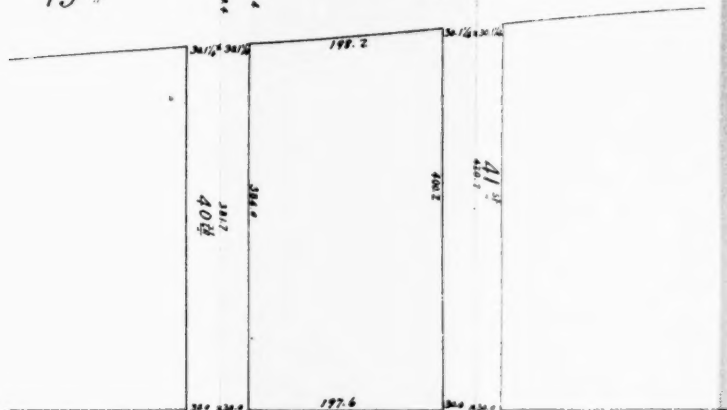
TO HAVE AND TO HOLD the said premises hereby granted to the said Robert Latou, his heirs and assigns to his own proper use, benefit and behoof forever.

North or Hudson River

Exterior line as Established by Law

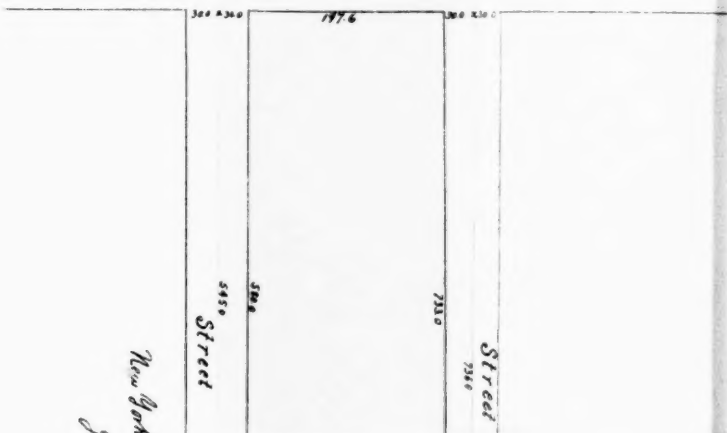
13th

Avenue



12th

Avenue



New York

148 *Petition, Schedule G, Grant to Robert Lafou.*

AND the said party of the second part for himself his heirs and assigns doth hereby covenant and agree to and with the said parties of the first part their successors and assigns that the said party of the second part his heirs and assigns shall and will within three months next after he or they shall be thereunto required by the said parties of the first part or their successors at his or their own proper costs and charges build, erect, make and finish or cause to be built, erected, made and finished according to any resolution or ordinance of the said parties of the first part or their successors already passed or adopted or that may hereafter be passed or adopted four good and sufficient Bulkheads, Wharves, Streets or Avenues which shall form so much and such parts of the Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets as fall within the limits of the premises first above described and are reserved as aforesaid from out thereof for public streets

149

AND will fill in the same with good and sufficient earth and regulate and pave the same and lay the sidewalks thereof.

AND also that the said party of the second part his heirs and assigns shall and will from time to time and at all times forever hereafter at his own proper costs, charges and expenses uphold and keep in good order and repair the whole of those parts of the said Twelfth and Thirteenth Avenues and Fortieth and Forty-first Streets which the said party of the second part hath covenanted and agreed to make, erect and build as aforesaid and will at all times forever hereafter obey, fulfill and observe such ordinances, resolutions, orders and directions as the said parties of the first part.

150

AND their successors shall from time to time erect and pass or make relative thereto.

Petition, Schedule G, Grant to Robert Laton. 151

AND also that the said streets or avenues shall forever thereafter continue to be and remain public streets or avenues and highways for the free and common use and passage of the inhabitants of said City and all others passing and repassing by, through and along the same in like manner as the other public streets, avenues, bulkheads and wharves of the said City now are or lawfully ought to be and in case default shall be made by said party of the second part, his heirs and assigns in building, erecting, making or finishing the said bulkheads, wharves, streets or avenues by him covenanted herein to be built, erected, made and finished and in filling in the same or any part thereof or in complying with any ordinance, resolution or order of the said parties of the first part or their successors when required, then and in that case it shall and may be lawful for the said parties of the first part or their successors to build, erect, make or finish the bulkhead, wharves, streets or avenues as aforesaid and to fill in the same and to regulate and pave the same and to lay the sidewalks thereof at the proper costs and charges of the said party of the second part, his heirs and assigns and to charge to and recover in an action at law from the said party of the second part, his heirs and assigns the amount thereof together with the interest thereon. 152

AND all costs and charges of the proceedings relative to the same or to sell and dispose of the whole of the said hereby granted premises or any part thereof at public auction for the most that can be had for the same and in case of any deficiency to charge with and recover from the said party of the second part, his heirs and assigns the amount of such deficiency or to adopt and pursue any legal right or remedy that the said parties of 153

154 *Petition, Schedule G, Grant to Robert Lafou.*

the first part or their successors now possess and enjoy under and by virtue of any act of the Legislature of the State of New York or that may hereafter be granted unto the said parties of the first part or their successors by the Legislature of the State of New York or to enter into and upon the whole or any part of the hereby granted premises and to grant the same and the right of making said bulkheads, wharves, streets or avenues and the right of receiving the wharfage, cramage and profits arising to and from the same to any other person or persons, their heirs and assigns forever.

155 AND also that the said party of the second part his heirs and assigns shall and will pay and satisfy all taxes assessments and impositions as well ordinary as extraordinary as are now or shall or may hereafter be lawfully imposed or levied upon the hereby granted premises under and by virtue of any act or acts of the Congress of the United States of America or of the Legislature of the State of New York or by any act ordinance or resolution of the said parties of the first part or their successors.

156 AND it is hereby further covenanted and agreed by and between the parties to these presents and the true intent and meaning hereof is that the said party of the second part his heirs and assigns will not build the said wharves bulkheads avenues or streets herein before mentioned or any part thereof or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part or their successors and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permis-

Petition, Schedule G, Grant to Robert Latou. 157

sion of the said parties of the first part their successor or assigns first had for that purpose.

AND the said parties of the first part for themselves their successors and assigns do covenant and agree to and with the said party of the second part his heirs and assigns that he the said party of the second part his heirs and assigns observing fulfilling and keeping all and singular the articles covenants and agreements herein mentioned and contained on his part to be kept and performed according to the true intent and meaning of these presents shall and lawfully may from time to time and at all times hereafter fully have and enjoy take and receive and hold to his own proper use all manner of wharfage cranage advantages or emoluments growing or accruing by or from that part of the said exterior line of the said City lying on the westerly side of the hereby granted premises fronting on the Hudson River with full power to collect and receive the same for his own proper use and benefit forever. 158

EXCEPTING therefrom such wharfage cranage advantages and emoluments to grow or accrue from the westerly end of the bulkhead in front of the entire width of the northerly half part of Fortieth Street and the southerly half part of Forty-first Street which shall be and are hereby reserved for the said parties of the first part their successors and assigns with full power to collect and receive the same for their own proper use and benefit forever. 159

AND it is hereby further agreed by and between the parties to these presents and the true intent and meaning hereof is that this present grant and every word or thing in the same contained shall not be construed or taken to be a covenant or covenants of warranty or of seizen of said parties

160 *Petition, Schedule G, Grant to Robert Laton.*

of the first part or their successors or to operate further than to pass the estate right title or interest they may have or may lawfully claim in the premises hereby conveyed by virtue of their several Charters and the various acts of the Legislature of the People of the State of New York.

AND it is hereby further mutually understood and agreed and these presents and the estate hereby granted are upon the express condition that if at any time hereafter it shall appear that the said party of the second part is not on the day of the date hereof seized of a good sure absolute and indefeasible estate of inheritance in fee simple of in and to the lands and premises on the easterly side of the premises hereby granted and adjoining the same or if the said party of the second part his heirs and assigns shall make default in the performance of any or either of the covenants above contained on his part.

161

AND behalf to be observed performed fulfilled and kept then and in every such case these presents and every article clause or thing herein contained shall be and become absolutely null and void and the said parties of the first part and their successors shall and may forthwith thereupon enter into and upon the said premises hereby granted shall thereafter be seized of the same with the appurtenances free clear and discharged of and from any claim right or pretence of claim or right of the said party of the second part his heirs and assigns anything herein contained to the contrary notwithstanding.

162

AND the said party of the second part covenants and agrees to pay the assessment and the interest due and to grow due thereon for building the sewer in Forty-second Street assessed upon the premises hereby granted and also to pay all expenses which

Petition, Schedule G, Grant to Robert Latou. 163

have been incurred by said parties of the first part for regulating the street embraced in the grant between the High Water Mark and the permanent exterior line of said City.

AND the said party of the second part for himself his heirs and assigns do hereby covenant and agree to and with the said parties of the first part their successors and assigns that he the said party of the second part his heirs and assigns shall and will in all things well and faithfully comply with and fulfill and perform all and every of the covenants conditions and agreements undertakings and provisions herein contained and on his part to be kept performed and complied with. 164

WITNESSETH WHEREOF to one part of these presents remaining with the said parties of the first part the said party of the second part hath set his hand and seal and to the other part thereof remaining with the said party of the second part the said parties of the first part have caused the common seal of the City of New York to be affixed the day and year first above written.

A. C. KINGSLAND, Mayor. BY THE COMMON COUNCIL, D. I. Valentine Clk. C. C. (LS). City and County of New York, ss.: 165

On this 30 day of December, 1852, before me came David I. Valentine to me personally known who being by me duly sworn deposed and said he is a resident of the City and County of New York that he is the Clerk of the Common Council of said City that the seal affixed to the within grant is the common seal of said City and was so affixed by their authority.

Geo. L. Taylor Comr. of deeds.

RECORDED the preceding at the request of R. Latou January 3d 1853 at 45 Min. past 11 A. M.

MAPS

TOO

LARGE

FOR

FILMING

**Schedule I.—Proceedings of Commissioners
of Sinking Fund.**

169

**COMMISSIONERS OF THE SINKING FUND
OF THE CITY OF NEW YORK.**

Proceedings of the Commissioners of the Sinking Fund, at a Meeting Held in Room 16, City Hall at 11 o'clock A. M. on Thursday, June 1, 1916.

Present: Frank L. Dowling, President, Board of Aldermen; Alexander Brough, Deputy and Acting Comptroller; Milo R. Maltbie, Chamberlain; Francis P. Kenney, Chairman; Finance Committee, Board of Aldermen.

170

The minutes of the meetings held May 18th and 22nd, 1916, were approved as printed.

Dock Department: Amendment of the Amended New Plan for Improvement of the Waterfront between W. 38th and W. 42nd St., North River, Borough of Manhattan.

The Chair called for a public hearing in the matter of the alteration and amendment of the amended new plan for the improvement of the water-front between W. 38th and W. 42nd Sts., Borough of Manhattan, adopted by the Commissioner of Docks in accordance with law, May 1, 1916, and transmitted to the Commissioners of the Sinking Fund for approval. (Affidavit as to publication of Notice of Hearing in the City Record on file with papers.)

171

The following was received from the Commissioner of Docks:

**MAPS
TOO
LARGE
FOR
FILMING**

Petition, Schedule I, 1916 Proceeding for Amendment of Plan of 1871 (Including Schedule C). 175

Pier A, North River, May 1, 1916.

Amendment to New Plan, 28th to 42nd Sts.,
North River.

HON. JOHN PURROY MITCHELL, Mayor, Chairman of the Commissioners of the Sinking Fund:

Sir:

I transmit herewith tracing and print, together with technical description, for the alteration and amendment of the amended New Plan between West 38th and West 42nd Streets, North River, Borough of Manhattan. 176

The amendment consists in the discontinuance of the present bulkhead line between the northerly side of West 38th Street and the southerly side of West 42nd Street, and the establishment of a new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place.

I have today adopted this amendment to the New Plan and respectfully submit it with the request that it be approved by the Commissioners of the Sinking Fund. 177

Very truly yours,

R. A. C. SMITH, Commissioner of Docks.

No one appearing against the proposition, the Deputy and Acting Comptroller presented the following report and offered the following resolution:

178

May 26, 1916.

To the Honorable the Commissioners of the
Sinking Fund:

Gentlemen:

179

In a communication dated May 1st, 1916, the Commissioner of Docks transmitted for approval a plan for the alteration and amendment of the amended New Plan for the improvement of the water-front and harbor of the City of New York between West 38th and West 42nd Streets, North River, Borough of Manhattan.

The proposed amendment consists in the discontinuance of the present bulkhead line between the northerly side of West 38th Street and the southerly side of West 42nd Street, and the establishment of a new bulkhead line 100 feet inshore thereof, and a marginal street, wharf or place.

By this amendment, the effective length of the piers is increased 100 feet, and there is still available a width of 50 feet for a marginal street, wharf or place.

180

In the event of the Commissioners of the Sinking Fund approving the amended plan at the public hearing to be held, pursuant to chapter 372 of the Laws of 1907, the attached resolution is recommended for adoption approving the request. Respectfully,

ALEX BROUGH,

Deputy and Acting Comptroller.

Resolved, That the Commissioners of the Sinking Fund hereby approve of the plan for the amendment of the plan, for the improvement of the waterfront and harbor of The

Petition, Schedule J, 1920 Proceedings & Amendment of Plan of 1871. 181

City of New York between the northerly side of West 38th Street and the southerly side of West 42nd Street, North River, Borough of Manhattan, as adopted by the Commissioner of Docks in accordance with law May 1, 1916.

The report was accepted and resolution adopted, all the members present voting in the affirmative.

The Chair then declared the hearing closed.

182

Schedule J.—Plan and Proceedings of 1920.

CITY OF NEW YORK

DEPARTMENT OF DOCKS

OFFICE OF THE COMMISSIONER

Pier A, North River March 30th, 1920.

McK/Ac

To: HON. JOHN F. HYLAN,
Mayor and Chairman of the
Commissioners of the Sinking Fund.
FROM: Department of Docks.
SUBJECT: *Transmittal of map.*

183

1. I transmit herewith for the approval of the Commissioners of the Sinking Fund map of the waterfront, showing proposed amendment and alteration of the plan as determined upon by the Board of the Department of Docks on April 13th, 1871 and approved by the Commissioners of the

- 184 *Petition, Schedule J, 1920 Proceedings & Amendment of Plan of 1871.*

Sinking Fund on April 27th, 1871 on the North River, as subsequently altered and amended between West 35th and West 43rd Streets, Borough of Manhattan, together with a technical description showing the proposed changes thereat. The principal change effected by this proposed amendment is the abolishment of seven existing piers, which are to be replaced by four modern piers each 150 feet in width with slips between 332' 10" in width.

- 185 2. I would respectfully request that you set a date for a public hearing on the proposed amendment at the earliest practicable date.

(Signed) MURRAY HULBERT,
Commissioner of Docks.

**MAPS
TOO
LARGE
FOR
FILMING**

190

**Affidavit of Murray Hulbert Read in Opposition
to Motion.**

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

of

191

The Application of EDGAR S. AP-
PLEBY and JOHN S. APPLEBY,
for a peremptory writ of man-
damus

against

MURRAY HULBERT, as Commis-
sioner of Docks of The City of
New York.

192

STATE OF NEW YORK,) ^{iss.:}
County of New York, (

MURRAY HULBERT, being duly sworn, deposes
and says:

I am the Commissioner of Docks of the City
of New York, and have been such since January
1st, 1918.

Upon information and belief, I deny each and
every allegation contained in the paragraphs of
the petition herein numbered respectively "3",
"7", "10", "21", "23", "35", "36", "37",
"38" and "39".

I deny that I have any knowledge or informa-
tion with respect to any of the allegations con-

Affidavit of Murray Hulbert, Read in Opposition to Motion. 195

tained in the paragraphs of the petition numbered respectively "20" and "24" sufficient to form a belief as to the truth thereof.

Upon information and belief, I deny each and every allegation contained in the paragraph of the petition numbered "2", except that the petitioners have such interest in the premises therein described as a private citizen is capable of having.

Upon information and belief, I deny each and every allegation contained in the paragraph of the petition numbered "6", except that the new plan referred to in deponent's communication of January 31, 1920, was that adopted by the Commissioner of Docks on May 1, 1916, and approved by the Commissioners of the Sinking Fund on June 1, 1916. 194

Deponent further states that the application referred to in paragraph "4" of the petition called for the construction of substantial structures and solid filling outshore of the bulkhead line shown upon the amendment of the new plan for the improvement of the waterfront of the locality in question, adopted by the Commissioner of Docks on May 1, 1916, and approved by the Commissioners of the Sinking Fund on June 1, 1916. The Commissioner was, therefore, without power to grant such application, for the reason that the carrying out thereof would be in violation of law. 193

MURRAY HULBERT.

Sworn to before me this)

7th day of June, 1920.)

JOSEPH A. BOYLAN,

Commissioner of Deeds, City of New York,

Residing in the Borough of Richmond,

N. Y. County Clerk's No. 185,

N. Y. County Register's No. 21110.

Term Expires July 1, 1921.

Opinion.

LAW JOURNAL, DECEMBER 3, 1920.

By Mr. Justice Finch.

- Matter of Appleby and ano. v. Hulbert, &c.*—No matter how complete a grant of power was made by the Legislature of the State of New York to the City of New York, yet when the city made the grant to the father of the petitioners it was expressly upon permission being obtained from the city before structures could be erected. Petitioners contend that the meaning of this condition is not as expressed, but seek to whittle down the same. They give, however, no sufficient reason. On the other hand, the inaction by the grantees for almost two generations makes against petitioners' contention. Such a construction as petitioners contend for would permit petitioners to speculate during the time of the passing of generations to await any turn of circumstances which would afford large profits at the city's expense without incurring any proportionate risk. This shows a lack of equity which bears against the construction contended for by petitioners. Motion denied. Settle order on notice.

Stipulation.

SUPREME COURT,

NEW YORK COUNTY.

IN THE MATTER

of

The Application of EDGAR S.
APPLEBY and JOHN S. APPLEBY,
for a peremptory writ of man-
damus

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against

MURRAY HULBERT as Commis-
sioner of Docks of The City of
New York.

IT IS HEREBY STIPULATED AND CONSENTED:

That the words "year 1890" in the sixth para-
graph of the Petition herein be changed to "year
1871."

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That the denials of paragraphs 23, 24 and 37
of the Petition be withdrawn and said paragraphs
admitted.

The denial of the following allegations in para-
graph 36 is withdrawn and the following allega-
tions are admitted:

That from time to time, the City of New York,
acting through the Commissioner of Docks or the
Commissioner of Docks and Ferries has built
piers in West 39th Street, West 40th Street and

202 West 41st Street, Borough of Manhattan, New York City, and has leased the sides of said piers and has dredged the petitioner's lands under water adjacent thereto.

Dated, New York, September 20, 1920.

BANTON MOORE,
Attorney for Petitioners.

JOHN P. O'BRIEN,
Corporation Counsel.

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STIPULATION WAIVING CERTIFICATION

SUPREME COURT, NEW YORK COUNTY

In the Matter of the Application of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus against MURRAY HULBERT, as Commissioner of Docks of the City of New York.

Pursuant to Section 3301 of the Code of Civil Procedure, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which said order was made, and the whole thereof, now on file in the office of the Clerk of the County of New York, and certification thereof pursuant to Section 1353 of the Code of Civil Procedure is hereby waived.

Dated, New York, March —, 1922.

Banton Moore, Attorney for Appellants. John P. O'Brien,
Corporation Counsel.

ORDER OF APPELLATE DIVISION

At a Term of the Appellate Division of the Supreme Court Held in and for the First Judicial Department, in the County of New York, on the 27th Day of April, 1922.

Present: Hon. John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd Smith, Alfred R. Page, Edgar S. K. Merrill, Justices.

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Relators, against JOHN T. DELANEY, as Commissioner of Docks of the City of New York, Defendant.

Upon the annexed waiver of notice of resettlement and on motion of Banton Moore, attorney for relators, it is

Ordered that the order in the proceeding entitled "In the Matter of Edgar S. Appleby and John S. Appleby, for a peremptory writ of mandamus, against Murray Hulbert as Commissioner of Docks of the City of New York," dated the 20th day of January, 1922 and entered and filed in the office of the Clerk of the Appellate Division of the Supreme Court, First Department, on or about the 3d day of March, 1922, be and the same hereby is resettled by substituting John T. Delaney as Commissioner of Docks of the City of New York, as defendant in this proceeding, in place and stead of Murray Hulbert as Commissioner of Docks of the City of New York, so as to read as follows:

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department, in the County of New York, on the 20th Day of January, 1922

Present: Hon. John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd Smith, Alfred R. Page, Edgar S. K. Merrill, Justices.

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus vs. JOHN T. DELANEY, as Commissioner of Docks of the City of New York

An appeal having been taken to this court by the relators, Edgar S. Appleby and John S. Appleby, from an order of the Supreme Court, New York County, entered on the 29th day of September, 1920, denying the application of Edgar S. Appleby and John S. Appleby, for a peremptory writ of mandamus directed to the Commissioner of Docks, requiring him forthwith to issue to the said relators a permit to improve their property according to a plan or plans annexed to the petition, and said appeal having been argued by Mr. Spotswood D. Bowers, of counsel for the relators, and by Charles J. Nehrbas, Assistant Corporation Counsel, of counsel for the respondent, and due deliberation having been had thereon, it is unanimously

Ordered, that the said order appealed from be and the same is hereby reversed without costs, and the motion herein is granted without costs. And it is further

Ordered, that thirty days after entry and service of this order, a peremptory writ of Mandamus issue out of and under the seal of this Court, directed to the Commissioner of Docks, requiring him forthwith to issue to the relators, Edgar S. Appleby and John S. Appleby, a certificate or written authority permitting them to improve their property mentioned and described in the petition, in the manner set forth by either Plans Nos. 1 or 2 in the petition set forth herein as the same may be modified by the Commissioner of Docks with a view to safeguarding the public interests, if the same shall be found to be necessary, unless within that time an appropriate proceeding shall have been instituted by or on behalf of the City of New York, to acquire title to the property, and property rights of the applicants necessary to deprive them of their existing right to construct, maintain and use a bulkhead on the bulkhead line as established by the approval of the Secretary of War in 1890, and to confine and limit them to the construction, maintenance and use of a bulkhead on the bulkhead line established by the Commissioner of Docks and approved by the Commissioners of the Sinking Fund in 1916, and if the City desires to construct and maintain a public marginal street or wharf between 12th Avenue and the said bulkhead line of 1916, as shown on the diagram accompanying the establishment thereof, then and in that event also to acquire the property and property rights of the applicants incidental thereto, and if the city desires not only to construct and maintain such a marginal street or wharf, but also to cut off the wharfage and the craneage rights of the applicants to wharfage or craneage on or at the bulkhead between 39th and 40th Streets and 40th and 41st Streets, then and in that event also to acquire title to the property and property rights of the applicants required for that purpose; and in the event of the institution by or on behalf of the City of such a proceeding within such

time the issuance of the mandamus order shall be deemed stayed for a reasonable time to enable the City to acquire the necessary property and property rights of the applicants.

DEFENDANT'S NOTICE OF APPEAL TO COURT OF APPEALS

NEW YORK SUPREME COURT, COUNTY OF NEW YORK

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Relators-Respondent, against JOHN T. DELANEY, as Commissioner of Docks of the City of New York, Defendant-Appellant

SIR:

Please take notice that the defendant in the above-entitled proceeding hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 20th day of January, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the 3rd day of March, 1922, as resettled by the order herein, dated the 27th day of April, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the same date, and a certified copy thereof filed in the office of the Clerk of the County of New York on or about the 29th day of April, 1922, which said order grants relators' motion for a peremptory writ of mandamus, and the said defendant appeals from each and every part of said order, as well as from the whole thereof.

Dated, New York, May 2, 1922.

Yours, etc., John P. O'Brien, Corporation Counsel, Attorney for Defendant-Appellant, Office and P. O. Address, Municipal Building, Borough of Manhattan, New York City.

To Banton Moore, Esq., Atty. for Relators-Respondents, 110 William St., Borough of Manhattan, New York City.

To William F. Schneider, Esq., County Clerk, New York County.

RELATOR'S NOTICE OF APPEAL TO COURT OF APPEALS

NEW YORK SUPREME COURT

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Relators-Respondents, against JOHN T. DELANEY, as Commissioner of Docks of the City of New York, Defendant-Appellant

SIRS:

Please Take Notice that the applicants, Edgar S. Appleby and John S. Appleby, hereby appeal to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, First Department, dated the 20th day of January,

1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the 3rd day of March, 1922, as resettled by the order herein, dated the 27th day of April, 1922, and entered and filed in the office of the Clerk of said Appellate Division on or about the same date, and a certified copy thereof filed in the office of the Clerk of the County of New York on or about the 29th day of April, 1922 in so far as said order limits the applicants' right to a peremptory writ of mandamus unless the City of New York should immediately acquire title to the property of the applicants, and said applicants appeal from each and every part of said order.

Dated, New York, May 3, 1922.

Yours, &c., Banton Moore, Attorney for Relators-Respondents,
Office & P. O. Address, 110 William Street, Borough of
Manhattan, City of New York.

To John P. O'Brien, Esq., Corporation Counsel, Municipal Building, City of New York; William F. Schneider, Esq., Clerk of the County of New York.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT, JUNE,
1916

John Proctor Clarke, P. J.; Frank C. Laughlin, Walter Lloyd Smith,
Alfred R. Page, Edgar S. K. Merrell, Justices

No. 6584

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a
Peremptory Writ of Mandamus vs. MURRAY HULBERT, as Commissioner of Docks of the City of New York

OPINION OF APPELLATE DIVISION

Appeal by petitioner from an order of the Supreme Court, New York County, at special term, denying their application for a peremptory writ of mandamus to compel the commissioner of docks to issue to them a permit for filling in land under water and the construction of a bulkhead

Spottswood D. Bowers (Banton Moore, Attorney) for Appellants.
Charles J. Nehrbas (John P. O'Brien, Corporation Counsel) for Respondent.

LAUGHLIN, J.:

The permit which appellants desired is with respect to the premises involved in the suit in equity brought by them against the City and others, in which their appeal from the judgment therein was argued and is to be decided herewith. The material facts with respect to the rights of the petitioners are stated in the opinion in that action and need not be restated here. The petition herein shows that on

the 5th of December, 1919, the petitioners presented to the Commissioner of Docks plans for the construction of a bulkhead on the bulkhead line established pursuant to the provisions of Chapter 574 of the Laws of 1871, and approved by the Secretary of War in 1890. One of these plans was for a solid filling from the bulkhead as then maintained by the appellants a little easterly of the easterly line of 12th Avenue, to said bulkhead line as so established. The other plan was for the construction of the bulkhead and an approach thereto covering the entire surface over the lands of the appellants between 39th and 40th Streets and 40th and 41st streets and the bulkhead as so then maintained by the appellant and the bulkhead line as so established, but provided that such construction should be on piles without filling. The application was in the alternative for the approval of one or the other of the plans and for a permit for construction in accordance therewith. It was denied on the ground that it was not in accordance with the new bulkhead line established in 1916, but no other objection to the proposed plans was made by the Commissioner. One of the proposed plans contemplated the filling in of 12th Avenue between 39th and 40th streets and 40th and 41st streets solid to the level of the surface of those streets as they now exist continued westerly as piers and the pavement of the surface with granite blocks; and the other plan contemplated the construction of such surfaces with granite block pavement resting on piles. We are deciding in the action that the fee to 12th Avenue is in the city. The original grants of the land under water between these streets, under which the petitioners claim, obligated the grantees when required by the Mayor, Board of Aldermen, and the Commonalty of the city or their successors, at their own proper costs and charges, to build, erect, make, and finish, or cause to be built, erected, made, and finished, bulkheads, wharves, streets, or avenues within the lines of 12th and 13th Avenues and 39th, 40th and 41st Streets in so far as the same were embraced within the exterior boundary lines of the grants, which embraced 12th and 13th Avenues between the center lines of 39th and 41st Streets and the three streets between those lines and the easterly line of 12th Avenue and the westerly line of 13th Avenue. The streets within those boundaries have already been made as piers, as stated in our opinion in the action, but the avenues within those boundaries have not been filled in nor made. By the original grants, the grantees and their successors were precluded from filling in or making the streets and avenues until permission therefor should be obtained from the Mayor, Board of Aldermen, and the Commonalty of the City or their successors, and also precluded them from building or erecting any wharf or pier or other obstruction in the Hudson River in front of the premises granted, without like permission. The bulkhead line, as established in 1916, crosses the premises granted by the original grants between 12th and 13th Avenues, somewhat nearer 12th than 13th Avenue. We are deciding in the action that the rights of the appellant are not limited or restricted by this bulkhead line, but only by the bulkhead line which has been approved by the Secretary of war. They have, we think, an absolute right to fill in from the

land granted by the same grants easterly of 12th Avenue, which has been filled in, to that bulkhead line, for it was fairly contemplated by the grants that they were to have free and unrestricted access to the bulkhead or wharf from all of the lands granted which might lie easterly of the bulkhead line when lawfully established, in order that they might enjoy the wharfage and cranage rights granted to them in consideration of the money paid by them and obligations to build bulkheads and to make and continue in repair the streets and avenues within the exterior boundaries of the grants; and of such rights they can be deprived only by a voluntary relinquishment thereof, or by the exercise of the right of eminent domain, and making to them just compensation therefor (*Langdon v. Mayor*, 93 N. Y. 128; *Williams v. Mayor*, 105 N. Y. 419; *Matter of Commissioner of Public Works*, 135 App. Div. 561, *aff'd* 199 N. Y. 531). The exercise by the appellants of the right to construct the bulkhead, not on 13th Avenue, as originally contemplated, but upon their own land, where the bulkhead line has been lawfully established as to them, however, is subject to the approval of the Commissioner of Docks, who, under the statute, has succeeded to the jurisdiction and functions of the Mayor, Board of Aldermen, and Commonalty of the City in the premises. Since no objection was made by the Commissioner of Docks to the alternative plans for this improvement presented by the appellants, and there has been extensive litigation between the parties, which should be brought to an end, the order should be reversed and the motion for a peremptory writ of mandamus, requiring the respondent to issue a permit to the appellants based on one or the other of the proposed plans, as the same may be modified by him with a view to safeguarding the public interests, should be granted; but if the Commissioner of Docks deems it necessary that the bulkhead and wharf should be built on the bulkhead line so established in 1916, the City should be afforded an opportunity to acquire the property and property rights of the plaintiffs essential to have the improvements conform to that bulkhead line.

It follows that the order should be reversed without costs, and motion granted without costs; but it will be provided in the order that the writ shall not be issued for thirty days, and if within that time, an appropriate condemnation proceeding shall be instituted to acquire the property and property rights of the relators, then the issuance of the writ shall be suspended for a reasonable time to enable the City to acquire such property and property rights, but otherwise the writ will be issued at the expiration of 30 days.

All Concur.

At a Special Term, Part II, of the Supreme Court Held in and for the County of New York, at the County Court House, in said County, on the 19th Day of April, 1922

Present: Hon. Daniel F. Cohalan, Justice.

In the Matter of EDGAR S. APPLEBY and JOHN S. APPLEBY for a Peremptory Writ of Mandamus, Petitioners, against MURRAY HULBERT, as Commissioner of Dockets of the City of New York, Respondent.

ORDER OF SUBSTITUTION

Upon the annexed waiver of notice of settlement and on motion of Banton Moore, attorney for petitioners, it is

Ordered that John T. Delaney as Commissioner of Docks of the City of New York be and he hereby is substituted as defendant in this proceeding in place and stead of Murray Hulbert, as Commissioner of Docks of the City of New York.

Enter.

D. F. C., J. S. C.

Notice of settlement of the foregoing order is hereby waived.

Dated, New York, April 19, 1922.

(S.) Banton Moore, Attorney for Petitioners. (S.) John P. O'Brien, Corporation Counsel, Attorney for Respondent.

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated that the papers as hereinbefore printed consist of true and correct copies of the notice of appeal, the order appealed from, the opinions of the Court and all the papers upon which the Court below acted in making the order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York.

Certification thereof in pursuance of Sections 577, 616 and 170, 1553 of the Civil Practice Act is hereby waived.

Dated, New York, June 10, 1922.

John P. O'Brien, Corporation Counsel, Attorney for Respondent, the City of New York. Banton Moore, Attorney for Appellants Appleby.

Compared & Correct undertaking given. J. M. J. S. C.

CLERK'S CERTIFICATE

STATE OF NEW YORK,
County of New York, ss:

Clerk's Office of the Supreme Court of the State of New York for
the County of New York

I, James A. Donegan, Clerk of the County of New York and of the Supreme Court of the State of New York for the said County of New York, by virtue of the annexed Writ of Error which was served upon me on the 24 day of August, 1923, and in obedience thereto, do hereby certify that the foregoing pages numbers from 1 to 84 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the Edgar S. Appleby and *vs.* John H. Delaney, et al. mentioned in said Writ of Error, as the same remain of record and on file in my office;

And that annexed hereto is the Petition for the said Writ of Error, the Assignment of Errors and Prayer for Reversal, Bond on Reversal, the Citation to the Defendants in error with admission of service of the same and said Writ of Error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand, at my office in the City and County of New York, the 30 day of August, 1923.

— — —, Clerk. (New York Seal.)

STATE OF NEW YORK, ss:

COURT OF APPEALS

State Reporter's Office

REPORTER'S CERTIFICATE

I, J. Newton Fiero, Reporter of the Court of Appeals of the State of New York, do hereby certify that I have compared the annexed copy of opinion in the case of In the Matter of the Application of Edgar S. Appleby, et al., for a Peremptory Writ of Mandamus, Appellants and Respondents, v. John H. Delaney, as Commissioner of Docks of the City of New York. Respondent and Appellant, decided by the Court of Appeals on the seventeenth day of April, 1923, with the official opinion rendered in such case, and I further certify that the same is a true and correct copy of said opinion and of each and every part thereof.

In witness whereof, I have hereunto affixed my signature as Reporter of the Court of Appeals, at the City of Albany, in the State of New York, this sixth day of September, 1923.

J. Newton Fiero, As Reporter of the Court of Appeals of the State of New York. Attest: R. M. Barber, Clerk of the Court of Appeals. [Seal of the State of New York Court of Appeals.]

STATE OF NEW YORK:

COURT OF APPEALS

CHIEF JUSTICE'S CERTIFICATE

I, Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York, the highest Appellate Court and Court of Record in and for said State, do hereby certify that Richard M. Barber is the clerk of said court, having custody of the seal of said court and of the decisions, minutes and records thereof, and that J. Newton Fiero is the official reporter of said court, having custody of the official opinions, written and handed down by said court and the members thereof, and of the official publication and reports thereof; and I further certify that the attestation and authentication, by said clerk and said reporter of the annexed copy of the official opinion rendered in the case of *In the Matter of the Application of Edgar S. Appleby et al., for a Peremptory Writ of Mandamus, Appellants and Respondents, v. John H. Delaney, as Commissioner of Docks of the City of New York, Respondent and Appellant*, decided by the said Court of Appeals on the 17th day of April, 1923, is in due form and sufficient under the laws of the State of New York and the rules and practice of the said Court of Appeals; that the seal imprinted thereon is the true and genuine seal of the said Court of Appeals, and that the signature of Richard M. Barber, as clerk of said court, appended thereto is the true and genuine signature of said Richard M. Barber, and the signature of J. Newton Fiero, as reporter of said court, appended thereto is the true and genuine signature of said J. Newton Fiero.

In witness whereof, I have hereunto subscribed my official signature at the Chambers of said court at the Court of Appeals Hall, in the City of Albany and State of New York, on the 12 day of September in the year one thousand nine hundred and twenty-three.

Frank H. Hiscock, As Chief Judge of the Court of Appeals of the State of New York.

 IN THE COURT OF APPEALS

[Title omitted]

(Decided April 17, 1923)

OPINION

Cross-Appeals from order of appellate division, first department, reversing an order of special term which denied plaintiffs' motion for a peremptory mandamus requiring the defendant to approve certain dock plans and granting the application

Banton Moore for relators, appellants and respondents.

John P. O'Brien, Corporation Counsel (Charles H. Nehrbas of counsel), for defendant, respondent and appellant.

POUND, J.:

Relators seek to compel the commissioner of docks to approve permits for the filling in of lands under water.

The facts herein are substantially the same as in *Appleby v. City of New York*, decided herewith, with this difference: The city established a new bulkhead line in 1916, which crosses the premises granted between Twelfth and Thirteenth avenues. It was held in the action that the rights of the relators are not limited by this bulkhead line but only by the bulkhead line established by the secretary of war. The court below decided herein that a writ of peremptory mandamus should issue unless condemnation proceedings were instituted to acquire relators' property and property rights within such line. (199 App. Div. 552.)

We held in the action that the title of relators to lands actually under water is subject to the rights of the city to improve the same for the purposes of navigation but that the city must re-acquire the property right in the land under water which it has conveyed before it can carry out its plans for such improvement.

This application should not, however, be granted. Section 15 of title 4 of the sinking fund ordinance of 1844, referred to in the opinion in the action, provides:

"No grant made by virtue of this ordinance shall authorize the grantee to construct bulkheads or piers or make land in conformity therewith, without permission to do so is first had and obtained from the common council."

The water grants under which relators hold title also provide:

"And it is hereby further covenanted and agreed, by and between the parties to these presents, and the true intent and meaning hereof is that the said party of the second part, his heirs and assigns will not build the said wharves, bulkheads, avenues or streets hereinbefore mentioned or any part thereof, or make the lands in conformity with the covenants hereinafter mentioned until permission for that purpose shall be first had and obtained from the said parties of the first part, or their successors, and will not build or erect or cause to be built or erected any wharf or pier or other obstruction in the Hudson River in front of the hereby granted premises without the permission of the said parties of the first part or their successors or assigns first had for that purpose."

In *Duryea v. Mayor*, etc. (62 N. Y. 592) it was said that a similar clause did not limit the right of the owners to fill the space between the streets, but on a subsequent appeal (*Duryea v. Mayor*, etc., 96 N. Y. 477) it was said that the provisions of the sinking fund ordinance had not been called to the court's attention on the first appeal and it was held that the council had given its consent. We are free to interpret the clause according to its meaning. To construe the ordinance and the grants as permitting the filling of the land between the streets at the will of the grantee and as prohibiting the building of the wharves and streets without the consent of the common coun-

cil would be unreasonable. The lands are thus held subject to the conditions of the grant and may not be filled in without the approval of the city authorities. The power to grant permission to construct bulkheads or piers and to make land in conformity with relators' grants implies the right to withhold such permission.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in this court and in the Appellate Division.

Hiscock, Ch. J., Hogan, Cardozo, McLaughlin, Crane and Andrews, JJ., concur.

Ordered accordingly.

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR WRIT OF ERROR

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

And now come Edgar S. Appleby and John S. Appleby, plaintiffs in error and petitioners, and represent that on June 4, 1923 an order of the Court of Appeals was made and entered June 13th, 1923 denying said petitioners motion for reargument of this proceeding and the order of said Court of Appeals made and entered on April 17, 1923, which reversed an order of the Appellate Division of the Supreme Court herein with costs, dated April 27, 1922 and duly entered, and which order of said Appellate Division reversed an order of the Supreme Court, New York County, dated and entered December 11, 1920, which last mentioned order denied "as a matter of right and not in the exercise of discretion, with \$10 costs," said petitioners' application for a peremptory writ of mandamus to the Commissioner of Docks of the City of New York to compel him to approve certain plans submitted to him by petitioners for the improvement of their submerged lands inside the Federal harbor lines.

That this proceeding was for a writ of mandamus as aforesaid. That the said petitioners were and are the owners of two certain blocks of land under water in the Borough of Manhattan, City of New York between Twelfth and Thirteenth Avenue, one block between West 39th and West 40th Streets, and the other block between West 40th and West 41st Streets. That the Secretary of War pursuant to the River and Harbor Act of 1890 established a bulkhead line across said property 150 feet west of and parallel with said Twelfth Avenue, and a pierhead line about 350 feet west of said property and 700 feet west of and parallel with the bulkhead line.

That the petitioners desired to improve that portion of their property inside the Federal bulkhead line and applied to the said Commissioner of Docks to approve certain plans and for a permit to do the work. Said Commissioner made no objections to plans from a struc-

tural or safety point of view but denied said application "on account of the fact that the proposed construction is not in accordance with the new plan" (fol. 104) of the City of New York for the improvement of the water front.

As a defense to the application for said writ of mandamus, the said Commissioner of Docks filed an affidavit which denied certain allegations of the petitioners and alleged that he was "without power to grant such application, for the reason that the carrying out thereof would be in violation of law" (fol. 193).

No other defense to said application was made except and until the argument in the Court of Appeals, when the Corporation Counsel, Attorney for said Commissioner, urged that Section 15 of Article 4 of the Sinking Fund Ordinance of 1844 and the deeds under which petitioners claim title provided that the lands "may not be filled in without the approval of the City authorities." 235 N. Y. 364, 367.

And your petitioners aver that in their said petition they expressly charged that if the adoption of "the amended new plan, so called be construed as impairing, interfering with or destroying petitioners' property or rights they are and were invalid as violating, first Article I, Section 10, Part I, of the Constitution of the United States, by impairing the obligation of a contract; second in violation of Articles V and XIV (Section 1) of the additions to and amendments of the Constitution of the United States, and Article 1, Section 6, of the Constitution of the State of New York, by depriving the petitioners or their predecessors in title of their property or rights without due process of law and taking their property for public use, without just compensation" (fols. 30-31).

That in this writ your petitioners claimed to be the absolute owners of the property sought to be improved, with the title, right, privilege and immunity under the Sections of the Constitution of the United States, aforesaid, and the Act of Congress, known as the River and Harbor Act of 1890, as amended by Act of March 3, 1899 (30 Stat. 1151-1155), and the right to improve their property at their pleasure; that, notwithstanding these facts, the said Court of Appeals decided against the title, right, privilege and immunity thus specifically set up and claimed by the petitioners. And petitioners respectfully allege that the said orders of the Court of Appeals and the interpretation of the said Ordinance of 1844 and the deeds herein, were and are repugnant to the Constitution and Laws of the United States.

And your petitioners further aver that in the aforesaid order and proceedings certain errors were committed to the prejudice of your petitioners, all of which will more fully appear from the assignment of errors, which is filed herewith.

Wherefore, your petitioners pray that a writ of error from the Supreme Court of the United States may issue in this proceeding to the Court of Appeals of the State of New York, or the Clerk of the Supreme Court, New York County, who now has custody of the record, for the correction of errors so complained of and that a transcript of record, proceedings and papers in this cause duly authenticated

by the Clerk of the Supreme Court, New York County, may be sent to the Supreme Court of the United States as provided by law.

Dated, August 15, 1923.

Banton Moore, Attorney for Petitioners and Plaintiffs in Error.

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Edgar S. Appleby and John S. Appleby, petitioners and plaintiffs in error, by Banton Moore, their attorney, and in connection with their petition for a writ of error show that in the record and proceeding and in the rendering of the decision of the Court of Appeals in the above entitled proceeding manifest error has intervened to the prejudice of petitioners and plaintiffs in error in this, to-wit:

First. That the Court erred in construing Section 15, of Title 4 of the Sinking Fund Ordinance of 1844, which has not been pleaded, and should not have been read on argument, so as to deprive petitioners of their property and rights without due process of law and without compensation. That according to the facts and the established rule of law and the judgment in the action of Appleby vs. The City of New York, et al., 235 N. Y. 351, said petitioners have property and property rights for which they are entitled to the protection of the Federal and State Constitution and Laws, and that the ruling of the Court of Appeals herein is erroneous and partly beyond and partly against the Federal Act and authority and in favor of State Act and authority, so that it intervenes petitioners' constitutional rights, by taking their property without compensation and without due process of law, and by depriving them of equal protection of the laws, and by violating the obligation of their contract.

Second. That there is a conflict of decisions upon an important question of law. That the present ruling is erroneous and based upon a city ordinance not in the record and which should not have been read on argument.

Third. That the Court has overlooked an important fact in this proceeding, admitted by stipulation, to wit: that the City has constructed piers in the streets (fol. 201) which would have, under the judgment made in the case of Appleby vs. City of New York, required a different final order to that made herein.

Fourth. That the Court erred in construing the language of the grant, contrary to all its previous decisions, which constituted a sale of property, upon which petitioners relied, and which power said

court cannot exercise, and which error caused the Court to make the final order which was made herein.

Fifth. That by reason of the said rulings and arbitrary action and power of the City authorities, the petitioners are forever deprived without compensation in violation of Article I, Section 10, Part 1 of the Constitution of the United States, by violating the obligation of their contract, and Article XIV, Section 1 of the amendments to the Constitution, and of Article I, Section 6 of the Constitution of the State of New York, by depriving petitioners of their property and property rights, and the sum of \$74,426.01 in taxes paid said City, without due process of law and taking their property without compensation.

Sixth. That the ruling herein of said Court changes the established law, which constituted a rule of property, upon which petitioners and their predecessors in title relied in the payments aforesaid to said City for said deeds and said taxes, and thereby takes away their said property and rights acquired by contract and which comes under the protection of the Constitution of the United States as aforesaid.

By reason whereof, these petitioners and plaintiffs in error pray that the said final order of the Court of Appeals may be reversed and that the motion be granted unless the City of New York desires to acquire the property to legalize its appropriation, in which event the writ of mandamus be stayed for a reasonable time to permit the said City to do so.

Dated, New York, August 15th, 1923.

Banton Moore, Attorney for Petitioners and Plaintiffs in Error.

COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

On reading the petition of Edgar S. Appleby and John S. Appleby, for writ of error and the assignment of errors, and upon due consideration of the record of said cause:

It is ordered, That a writ of error be allowed from the Supreme Court of the United States to the Court of Appeals of the State of New York, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioners and plaintiffs in error give security in the sum of One thousand Dollars (\$1,000), that the said plaintiffs in error shall prosecute said writ of error to effect, and if said plaintiffs in error fail to make their plea good, shall answer to the de-

defendants in error for all costs and damages that may be adjudged or decreed on account of said writ of error.

And the said plaintiffs in error now presenting a bond in the sum of One thousand Dollars (\$1,000.) with the National Surety Company, as surety, it is Ordered that the same be and hereby is duly approved.

In witness whereof, I have hereunto set my hand this 17 day of August, 1923.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

BOND ON WRIT OF ERROR [For \$1,000.00; filed and approved Aug. 17, 1923; omitted in printing]

CITATION

UNITED STATES OF AMERICA, ss:

To George P. Nicholson, Esq., Corporation Counsel, Atty. for and the Commissioner of Docks, of the City of New York, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within thirty days from the date of the service of this citation, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court, New York County, wherein Edgar S. Appleby and John S. Appleby are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the order rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the hand and seal of the Honorable, the Chief Justice of the Court of Appeals of the State of New York, this 17 day of August, in the year of our Lord one thousand nine hundred and twenty-three.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York. Attest: R. M. Barber, Clerk of the Court of Appeals of the State of New York. (Seal of Court of Appeals, State of New York.)

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Court of Appeals of New York and the Clerk of the Supreme Court, New York County, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said matter before you or

some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Edgar S. Appleby and John S. Appleby, and John H. Delaney, as Commissioner of Docks of the City of New York, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity and wherein was drawn in question the validity of a State statute or of an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity, and wherein in a title, right, privilege or immunity was claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States, and the decision was against the title, right, privilege or immunity especially set up or claimed under such Constitution, treaty, statute, commission or authority, the manifest error hath happened to the great damage of the said Edgar S. Appleby and John S. Appleby as by their petition appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this appeal, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof. That the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 21st day of August, in the year of our Lord, One Thousand, Nine Hundred and Twenty-three.

Alex Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York. (Seal of the District Court of the United States.)

Allowed by Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

Frank H. Hiscock, Chief Judge Court of Appeals, State of New York.

A copy of the within paper has been this day received at the Office of the Corporation Counsel.

Aug. 24, 1923.

George P. Nicholson, Corporation Counsel.

[File endorsement omitted.]

AT A SPECIAL TERM OF THE SUPREME COURT, PART II THEREOF,
HELD IN AND FOR THE COUNTY OF NEW YORK, AT THE COUNTY
COURT HOUSE, ON THE — DAY OF AUGUST, 1923.

Present: Honorable William Harmon Black, Justice.

[Title omitted]

ORDER TRANSMITTING RECORD

Upon reading the annexed affidavit of Banton Moore, verified August 28th, 1923, and upon the writ of error herein allowed by the Chief Judge of the Court of Appeals and issued by the Clerk of the District Court of the United States for the Southern District of New York, dated August 17th, 1923, now, on motion of Banton Moore, attorney for the plaintiffs, it is

Ordered that the order of the Court of Appeals be and the same hereby is made the order of this Court and that the Clerk of this Court transmit to the Clerk of the Supreme Court of the United States, the original writ of error and papers annexed, except the original bond, which he shall keep in his files together with a copy of said writ of error and papers annexed, as required by law.

Enter.

(623)